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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 33,712

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, A JOINT ASSOCIATION; PEPPERS REFINING COMPANY, A CORPORATION; SKELLY OIL COMPANY, A CORPORATION; SOHIO PETROLEUM COMPANY, A CORPORATION; STANOLIND OIL AND GAS COMPANY, A CORPORATION; MAGNOLIA PETROLEUM COMPANY, A CORPORATION; MID-CONTINENT PETROLEUM CORPORATION, A CORPORATION; ANDERSON-PRICHARD OIL CORPORATION, A CORPORATION; SINCLAIR-PRAIRIE OIL COMPANY, A CORPORATION; PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND GULF OIL CORPORATION, A CORPORATION,

Plaintiffs in Error,

VS.

L. T. ROSECRANS, MARY B. ROSECRANS, J. M. BAILEY, ADMINISTRATOR OF THE ESTATE OF MARY A. ROSECRANS, DECEASED; WANDA M. BOYD AND HER HUSBAND, JOHN H. BOYD; ALVA W. ROSECRANS AND HIS WIFE, FRANCES V. ROSECRANS; VERNIA L. BENNE AND HER HUSBAND, JOHN BENNE; GLENN H. ROSECRANS AND HIS WIFE, ANNA M. ROSECRANS; MAUDE BAILEY, R. M. BAILEY, HER HUSBAND; NELLIE JOHNSON, JOHN JOHNSON, HER HUSBAND; JUANITA MILLINER, H. R. MILLINER, HER HUSBAND; IRWIN COUCH, MERLE COUCH, THERESA COUCH, HIS WIFE, AND H. R. MILLINER, ADMINISTRATOR OF THE ESTATE OF CARRIE COUCH, DECEASED,

Defendants in Error.

STATEMENT AS TO JURISDICTION

Defendants in error will be referred to herein as appellants and plaintiffs in error as appellees.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the decision and judgment of the Supreme Court of Oklahoma, entered in this cause on July 11, 1950. Petition for Rehearing being duly filed on September 22, 1950, was denied October 3, 1950, as evidenced by Journal Entry as of that date.

Opinion Below

The decision and opinion of the Supreme Court of Oklahoma is published in the Oklahoma Bar Association Journal of July 15, 1950, Volume 21, page 1088, but has not been officially reported. A copy of same is attached hereto as Appendix "A" and appears in the record as a part thereof.

Matter Relating to Jurisdiction Date of Judgment

The decision and judgment of the Supreme Court of Oklahoma, sought to be reviewed, was entered on July 11, 1950. Petition for Rehearing duly filed on September 22, 1950, was entertained, considered and denied as evidenced by Journal Entry dated as of October 3, 1950. Said Supreme Court thereby rendered its final judgment in this cause. Said judgment is final and not subject to further review or correction in the courts of Oklahoma. A copy of the appellants' Petition for Rehearing and Brief in Support Thereof is attached hereto as Appendix "B". A copy of the Journal Entry denying same is attached hereto as Appendix "C".

Date of Application for Appeal to the Supreme Court of the United States

A petition for appeal is presented to the Supreme Court of Oklahoma herewith, to-wit: on the 19th day of December, 1950. Allowed same date.

Statutory Provision Sustaining Jurisdiction of the Supreme Court of the United States Over Appeal

The jurisdiction of the Supreme Court of the United States to review this decision and judgment by direct appeal is conferred by Title 28, United States Code, Judiciary and Judicial Procedure, Sec. 1257 (2); (Title 28 U.S.C.A. Sec. 1257 (2)), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

State Statutes, the Validity of Which Is Involved

There is drawn in question in this cause the validity of each of two state statutes of the State of Oklahoma on the grounds of their being repugnant to the Fourteenth (XIV) Amendment to the Constitution of the United States. The statutes of Oklahoma, the validity of each of which is involved, consist of Legislative Order No. 17,881 of the Corporation Commission of Oklahoma of June 4, 1945, and Legislative Order No. 3-45 of the Oklahoma Planning and Resources Board of June 14, 1945. The Order of the Corporation Commission with its accompanying opinion and findings is attached hereto as Appendix "D". It is not officially reported. Copy of said Order No. 3-45 of the Oklahoma Planning and Resources Board is attached hereto as Appendix "E". It is not officially reported. For convenience the pertinent portion of said Orders are quoted

hereinafter under the heading, "Presentation of Federal Questions to Courts Below."

Each of said orders constitutes state legislation, and therefore, a state statute within the meaning of Title 28, United States Code, Section 1257 (2).

"A statute of any state" is defined to include every legislative action to which a state gives force of law. See: *Williams* v. *Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716 (1878); *John P. King Mfg Co.* v. *Augusta*, 277 U. S. 100, 72 L. Ed. 801 (1928); *Lake Erie & Western R. Co.* v. *State Public Utilities Commission*, 249 U. S. 422, 63 L. Ed. 684 (1919); *Sultan Ry. & T. Co.* v. *Department of Labor*, 277 U. S. 135, 72 L. Ed. 820 (1928); *Albert W. Hamilton* v. *Regents of University of California*, 293 U. S. 245, 79 L. Ed 343 (1934).

Nature of Case

This was an action wherein appellant (owners in fee simple of one hundred sixty (160) acres of land invaded by millions of barrels of salt water deliberately injected by appellees) sought and obtained in the District Court of Oklahoma County, Oklahoma, verdict and judgment at law for ejectment and damages ($12,500.00, actual, and $10,000.00, punitive) against all appellees. The judgment so obtained was reversed, with directions to render judgment for appellees, by the Supreme Court of Oklahoma (the court of last resort in said state), that court holding that certain legislative and administrative orders (statutes) gave authority for the admitted acts of appellees and immunity from liability to appellants for the necessary consequences thereof. A fuller explanation will appear hereinafter under the headings of "Statement of the Case" and "Presentation of Federal Questions to Courts Below".

Assignment of Errors Involving Federal Questions

The Assignment of Errors of appellants relied on to support the jurisdiction of this Court asserts that the Supreme Court of Oklahoma erred:

> "1. In upholding and sustaining the validity of the Oklahoma Statute as reflected in the Legislative Order No. 17,881 of the Corporation Commission of Oklahoma as against the contention of defendants in error that same in its necessary effect is repugnant to and violative of the Fourteenth (14th) Amendment to the Constitution of the United States;
>
> 2. In upholding and sustaining the validity of the Oklahoma Statute as reflected in the Legislative Order No. 3-45 of the Oklahoma Planning and Resources Board as against the contention of defendants in error that same in its necessary effect is repugnant to and violative of the Fourteenth (14th) Amendment to the Constitution of the United States:
>
> 3. In holding that defendants in error have no right of recovery on account of admitted acts amounting in their necessary effect to a taking of the property of defendants in error for public use without compensation in violation of the Fourteenth (14th) Amendment to the Constitution of the United States;
>
> 4. In holding that defendants in error have no right of recovery on account of admitted acts amounting in their necessary effect to a taking of the property of defendants in error for private use of plaintiffs in error without their consent, over their objection, and without compensation in violation of the Fourteenth (14th) Amendment to the Constitution of the United States;
>
> . . . . . .
>
> 6. In holding lawful the taking and using of the property of defendants in error against their will by which the Court approves statutory procedure which amounts

to condemnation without compensation contrary to the Fourteenth (14th) Amendment to the Constitution of the United States;

7. In giving effect to the said Oklahoma Statutes which necessarily have the effect of depriving defendants in error of their property by which the Court approved the taking of said property without due process of law and the denial of the equal protection of the laws contrary to the guaranties contained in the Fourteenth (14th) Amendment to the Constitution of the United States."

Statement of the Case

This is a case of widespread public interest and concern. Generally speaking, it involves the asserted right of the oil industry, with the aid of the powers of the sovereign state, to take and use for public and private use, without compensation, and for underground storage and disposition of salt water, the substrata underlying lands privately owned in fee simple without the consent and over the objection of the owners. It involves approval and adoption by the Supreme Court of Oklahoma of the otherwise unsupported doctrine that there may constitutionally be "condemnation without compensation." This notwithstanding the fact that this court and others with practical uniformity have held to the contrary. See the cases later cited.

Appellants sued appellees in the District Court of Oklahome County in ejectment, for injunction, recovery of mesne profits and other damages, alleging that appellees were wrongfully taking and had wrongfully taken and used and damaged the private property of appellants for their own use and profit and otherwise without the consent of appellants and against their will in that appellees had gathered and pumped millions of barrels of salt water collected from their many widespread wells into, and thus had

continuously occupied and used, the subsurface strata of appellants' land at a saving and profit to appellees of many hundreds of thousands of dollars. Appellees admitted this but defended on the grounds, (1) that they had legislative authority for so doing in two Oklahoma statutes (legislative orders of administrative boards), and (2) that the public interest required that they be permitted to so use the land of appellants. Appellees answered pleading and relying upon the aforesaid Oklahoma statutes to which appellants replied that such statutes were unconstitutional and ineffective, each being violative of the Fourteenth (XIV) Amendment to the United States Constitution. Verdict and judgment were for appellants which the Supreme Court of Oklahoma reversed, holding:

> (1) The Oklahoma statutes were constitutional and furnished adequate authority for the invasion and use complained of;
>
> (2) Public requirement and interest justified the taking and use of appellant's land without compensation;
>
> (3) Appellees had really neither taken nor damaged any property belonging to appellants; and
>
> (4) Appellants, therefore, were without remedy.

Specifically, the Supreme Court held, among other things, that:

> (a) There was no evidence of "interference of any kind with the full use and enjoyment of the land by them (appellants).";
>
> (b) Appellants were not "deprived of any right pertaining to, or inconsistent with, the full and complete use, occupation, or enjoyment, of their land.";
>
> (c) The admitted acts of appellees did not deprive "the plaintiffs of any right in the full and complete possession and use of their property * * * "; and

(d) "We are unable to see where any injustice has been done to plaintiffs or the value of their property or their rights in their property in any wise diminished."

The Supreme Court of Oklahoma further commented:

"The Attorney General of the State has filed a brief *amicus curiae* on behalf of the State calling attention to the large production of salt water as a necessary incident to the production of oil and gas; the detriment to the State and its citizens occasioned by permitting this salt water to get into the streams, lakes or fresh water strata in the State; the fact that underground disposal in salt water bearing formations is rapidly becoming a common practice in oil producing states, and is the most logical and sensible solution of the problem of salt water disposal, and stating that if such disposal of salt water is forbidden unless oil producers first obtain the consent of all persons under whose lands it may migrate or percolate, underground disposal would be practically prohibited."

And further:

"The defendants and the Attorney General unhesitatingly admit and affirm the liability of the defendants or other oil producers disposing of salt water by injection into the underground formations for any actual damage or injury resulting therefrom to adjoining property owners."

And further:

"They (appellees) assert that the only liability of the defendants is a liability for actual damage or injury to the land of plaintiffs, or the deprivation of some right previously vested in plaintiffs to use, occupy, and enjoy their property fully and completely."

In conclusion the Supreme Court of Oklahoma stated:

> "Measured by this rule, we find that the act of the defendants in injecting salt water into said well was lawful, and that in the exercise of such right, defendants did not take the property of plaintiffs or any part thereof, or injure or damage same or deprive the plaintiffs of any rights in connection therewith."

A full, true, correct and complete copy of the opinion of the Supreme Court of Oklahoma appealed from herein is attached to this Jurisdictional Statement as Appendix "A" hereby referred to and incorporated herein by reference, the same as if set out in full herein. The facts as pleaded by appellants in their Petition and proved or admitted in the trial court, as referred to above, were set out in that opinion with substantial correctness but without direct reference to certain material evidence introduced before the jury and upon which the verdict of that jury was in part predicated. Briefly stated, those additional facts were:

> The uncontradicted evidence showed that the salt waters injected into the disposal well did not flow naturally or migrate or percolate or seep into the land of appellants even after they were placed in the disposal well. They were forced into appellants' land by the direct, deliberate and intentional act of appellees, by tremendous pressure applied by appellees to that water at the disposal well. Appellees knew, as did everyone else in advance of the disposal of this salt water that if it was placed in the disposal well under pressure, it would surely and certainly be forced into the substrata of appellants' land, there to be stored. Some four million barrels of salt water were collected by appellees from some two hundred wells widely scattered, and by means of a vast gathering and pumping system (built for the express purpose) were injected into the

disposal well under constant and continuously increasing pressure. It was an established and well-known fact in the oil industry that under such circumstances the water would inevitably travel "up dip" and into appellants' land. Appellants' land lay just a few feet immediately east of the disposal well and the substrata was geographically such that the salt water would occupy appellants' land and travel in a defined stream or course across the area of appellants' one hundred sixty acres in a triangular form, with the apex of the triangle at the disposal well. Appellees profited (to time of trial) to the extent of not less than ten cents per barrel (approximately $200,000) by using this means of disposal rather than the usual ones. At least fifty per cent of the salt water injected into the disposal well up to the time of the trial was forced into and stored in this manner within plaintiffs' land. This physically damaged the sub-surface structure.

Presentation of Federal Questions to Courts Below

As indicated above, the constitutional questions here relied upon were first raised in the Petition filed (Tr. 3, 8-9, 13) in the trial court by general allegations that appellees had wrongfully taken and used property of appellants without compensation and without their consent. When appellees answered, specifically relying (Tr. 21, 21-22) upon the aforesaid Oklahoma statutes as legislative authority for and immunity from liability for their admitted acts of invasion, appellants filed their Reply in and by which they specifically challenged the constitutionality of each such statute. The pertinent portion of Oklahoma Corporation Commission Order No. 17,881, thus relied upon by appellees reads:

> "That applicant, West Edmond Salt Water Disposal Association, be, and it is hereby granted the right and authority to dispose of salt water by gravity or injec-

tion under pressure into the Hoover and Tonkawa Sand Series found between the depths of 4500 and 5000 feet in the Robson No. 1 well located in the Northeast Quarter of the Northeast Quarter (NE¼ NE¼) of Section Twelve (12), Township Thirteen (13) North, Range Five (5) West, Canadian County, Oklahoma, in the West Edmond Hunton Pool."

A full, true, correct and complete copy of this Order is attached to this Jurisdictional Statement as Appendix "D", is incorporated herein and made a part hereof, the same as if set out in full herein.

The pertinent part of Order No. 3-45 of the Oklahoma Planning and Resources Board, thus relied upon by appellees, reads:

> "At a regular meeting of the above named Board, and acting upon the recommendation of the Director of the Division of Water Resources, this Board, insofar as it has power and authority under the laws of the State of Oklahoma and the Rules and Regulations of the Oklahoma Planning and Resources Board, approves the plan set forth in Application N. 3-45, filed the 12th day of May, 1945, by the West Edmond S.W.D.A. for disposal of Oil Field Brine produced along with oil, gas and other petroleum products upon the following described property:
>
> Twp. 15 N, Range 4 W, Oklahoma County
> Twp. 14 N, Range 4 W, Oklahoma County
> West Edmond Field."

A full, true, correct and complete copy of this Legislative Order is attached to this Jurisdictional Statement as Appendix "E", incorporated herein by reference and made a part hereof the same as if set out in full herein.

In their Reply, and separately as to each and both of the aforesaid Orders, appellants pleaded that the promulgating board in each instance:

"was wholly without legal power, authority and jurisdiction to make or enter any order by which it sought to or could take or deprive these plaintiffs of any of their constitutional or legal rights asserted in this cause;".

As to each of such Orders, and in such Reply, appellants stated that same is violative of constitutional and legal vested rights of appellants under each and both Federal and State Constitutions, in that such Order would and does:

"(a) Take the property of plaintiffs without due process of law;

(b) Take and damage the property of plaintiffs for the private use and benefit of defendants without the consent of plaintiffs and over their specific objections;

(c) Take and damage the property of plaintiffs, as by eminent domain, without authority of law and contrary to law and without compensation; and

(d) Deny to plaintiffs the equal protection of the laws;".

In its opinion, the Supreme Court of Oklahoma recognizes that these constitutional questions were properly and clearly raised, the Court saying:

"In their Reply, plaintiffs alleged that the Corporation Commission and the Planning and Resources Board were without legal power, authority and jurisdiction to make any order which would deprive plaintiffs of their constitutional or legal rights asserted in this action, and that if given such effect said orders were void as violative of the Constitution of Oklahoma and the Constitution of the United States, * * *."

As indicated above, the said legislative orders were treated by the trial court as completely ineffectual to furnish authority and immunity to appellees as against appellants' rights, and the jury's verdict settled the facts against appellees.

These same constitutional questions were fully briefed and argued to the Supreme Court of Oklahoma before the decision on the merits. The Farmers Union, representing several thousand members, intervened *amicus curiae* and supported appellants (Tr. 113-115). Subsequent to the opinion and decision first adverse to appellants (July 11, 1950), these questions were renewed, urged, reconsidered and decided adversely to appellants upon Petition for Rehearing and Brief in Support Thereof. Appellants asserted in their Petition for Rehearing (Appendix "B", p. 37):

> "(1) The Oklahoma Constitution and statutes as interpreted and construed by the Court in this cause are in conflict with the Fourteenth (XIV) Amendment to the Constitution of the United States;
>
> (2) In determining the orders of the Corporation Commission of Oklahoma and of the Oklahoma Planning and Resources Board to be constitutional authority for the acts herein complained of by defendants in error, this Court has necessarily decided this cause upon the sole basis of upholding the constitutionality of these statutes as against the claim of the plaintiffs that they violate the Fourteenth (XIV) Amendment to the Constitution of the United States, thus rendering this cause appealable to the Supreme Court of the United States as a matter of right if this petition for rehearing be denied;
>
> (3) The Court necessarily turned its decision upon the federal constitutional question and thus erroneously decided a federal question involving the constitutionality of state laws adverse to plaintiffs' claim of the unconstitutionality of such state laws;
>
> (4) The Court in its opinion in this cause has construed the Constitution of Oklahoma and the laws of said state in such a way that they necessarily conflict with the Fourteenth (XIV) Amendment to the Constitution of the United States;
>
> (5) So construed, the necessary effect of said Constitution and statutes is to take the property of defend-

ants in error for public use without just compensation in violation of the guarantees contained in the Fourteenth (XIV) Amendment to the Constitution of the United States;

(6) So construed, the necessary effect of said Constitution and statutes is to deny to defendants in error equal protection of the laws in violation of the guarantees contained in the Fourteenth (XIV) Amendment to the Constitution of the United States;"

The quotations from the Oklahoma Court's opinion above set out and the Order denying the aforesaid Petition for Rehearing (Tr. 185, 198); (see appendices "A," "B" and "C") show beyond cavil that the Federal questions were squarely raised and necessarily passed upon, the Court further saying:

> "While it is true that the defendants in this action do not own the land upon which the Robson well is located, they have a derivative right to inject salt water into said well, * * *."

The Court further said:

> "The question is one of first impression not only in this Court, but in the courts of last resort of the United States."

It is thus respectfully submitted that the Federal questions were timely, properly and adequately raised, were squarely passed upon by the State Supreme Court, which was necessary to a decision of the cause. It seems clear also that the validity of the Oklahoma statutes was thus necessarily upheld as against the claim of their invalidity and that the Federal questions involved were substantial.

The Questions Are Substantial

The Federal questions in this case are strikingly like the ones involved in *Portsmouth Harbor Land and Hotel Co.* v.

United States, 260 U. S. 327, 67 L. Ed. 287 (1922), the Court there saying:

> "But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it (the taking)."

In this case the Court should bear in mind that under Oklahoma statutes (O.S. 1941, Title 60, Secs. 64, 2, 6, 8), the owners in fee simple of land do not own merely the surface and mineral rights, but they own, hold and control the title and use and all rights and privileges incident and appurtenant thereto down to the center of the earth.

And the ownership of property carries with it the absolute right to prevent its taking or use by another, the right of exclusion from property being in itself a property right.

When one takes away by forcible non-consent user of another's property the right to sell to him the right of user thereof, he has taken the property itself. See *U. S.* v. *Carolene Products Co.*, 7 Fed. Supp. 500, 507 (D. C. Ill., 1934); *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. 294, 299 (C.A. 7 1902); *People* v. *Common Council*, 70 Mich. 534, 38 N. W. 470, 471 (1888); *Senior* v. *Braden*, 128 Ohio St. 597, 193 N. E. 614, 618, 619 (1934); *Bruch* v. *Carter*, 32 N. J. L. (3 Vroom) 554; *In re: Forsstrom*, 44 Ariz. 472, 38 Pac. (2d) 878, 880 (1934); 42 Am. Juris. 187, 188, 189, 191-192, 195, 196, 197, 199, 211, 213, 214, 217, 229.

Neither the state nor the nation may require the use of privately owned property without just compensation. *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U. S. 662, 79 L. Ed. 1640 (1935); *Delaware L. & W. R. Co.* v. *Town of Morristown*, 276 U. S. 182, 72 L. Ed. 523 (1928).

Any condemnation by or under eminent domain principles is denial of due process unless compensation is provided

for and paid, and neither physical invasion nor physical injury to the property is necessary to require the payment of such compensation. *Hot Springs R. Co.* v. *Williamson*, 136 U. S. 121, 34 L. Ed. 355, (1890); *Dohany* v. *Rogers*, 281 U. S. 362, 74 L. Ed. 904 (1930); 18 Am. Juris. 754; *Strain* v. *Cities Service Gas Co.*, 148 Kan. 393, 83 Pac. (2d) 124 (1938).

And it is no less a taking without due process (where no compensation is paid or provided for) simply because the one engaging in the taking (by continuous and repeated trespass or unauthorized user) is one having by law the power and right of eminent domain (as even in the case of the ultimate sovereign). And the taking of the use of property is the taking of that property. *Portsmouth Harbor Co.* v. *United States, supra; West* v. *C. & P. Tel Co., supra.*

If the Oklahoma statutes relied upon by appellees are unconstitutional, then appellees are wrongdoers, trespassers and invaders of property and property rights. In such event, the verdict in favor of appellants in the trial court would have to be reinstated. This would mean from Twelve to Twenty-two Thousand Five Hundred Dollars to the appellant-farmers, but more than this, if these statutes are valid, thousands and thousands of property owners not only in Oklahoma but on a nationwide scope, must see their property expropriated to satisfy the needs (?) and industrial desires and designs of an industry or industries. For if this property can be taken in the guise of "public need" and "private expediency" without compensation, there will be no ending to the cycle. Any time an industry becomes influential enough to command the support of the sovereign acting through administrative boards and the Chief Executive, then the private property of all other citizens becomes subservient. If this decision by the Supreme Court of Okla-

homa can stand, then the time honored precept of "no condemnation without compensation" is forever abrogated.

Finally, we point out that the Supreme Court of Oklahoma treated the Federal questions herein relied upon as substantial and as properly and timely raised under the Oklahoma practice. Such Court necessarily decided each of said questions against appellants and in so doing necessarily upheld the validity of the Oklahoma statutes involved as against the properly asserted claims of appellants that they were unconstitutional, each being in violation of the Fourteenth (XIV) amendment to the Federal Constitution. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 58 L. Ed. 584 (1914); *Cissna* v. *Tennessee*, 246 U. S. 289, 62 L. Ed. 720 (1918).

Conclusion and Prayer for Alternative Consideration

We submit that this "Statement as to Jurisdiction" clearly demonstrates that the questions presented in this appeal are meritorious, substantial and that they are of public importance and said appeal should be sustained and jurisdiction entertained by the Supreme Court of the United States. If, for any reason, the court should not assume jurisdiction of the appeal, pursuant to 28 U. S. Code (1948) Sec. 2103, the appellants pray that the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and that said writ of certiorari be granted.

Respectfully submitted,

/s/ JOHN H. CANTRELL,
/s/ B. H. CAREY,
/s/ CANTRELL, CAREY & MCCLOUD,
815 Perrine Building,
Oklahoma City, Oklahoma,
Attorneys for Appellants.

APPENDIX "A"

IN THE

SUPREME COURT OF THE STATE OF OKLAHOMA

No. 33,712

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, A JOINT ASSOCIATION; PEPPERS REFINING COMPANY, A CORPORATION; SKELLY OIL COMPANY, A CORPORATION; SOHIO PETROLEUM COMPANY, A CORPORATION; STANOLIND OIL AND GAS COMPANY, A CORPORATION; MAGNOLIA PETROLEUM COMPANY, A CORPORATION; MID-CONTINENT PETROLEUM CORPORATION, A CORPORATION; ANDERSON-PRICHARD OIL CORPORATION, A CORPORATION; SINCLAIR-PRAIRIE OIL COMPANY, A CORPORATION; PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND GULF OIL CORPORATION, A CORPORATION,

Plaintiffs in Error,

VS.

L. T. ROSECRANS, MARY B. ROSECRANS, J. M. BAILEY, ADMINISTRATOR OF THE ESTATE OF MARY A. ROSECRANS, DECEASED; WANDA M. BOYD AND HER HUSBAND, JOHN H. BOYD; ALVA W. ROSECRANS AND HIS WIFE, FRANCES V. ROSECRANS; VERNIA L. BENNE AND HER HUSBAND, JOHN BENNE; GLENN H. ROSECRANS AND HIS WIFE, ANNA M. ROSECRANS; MAUDE BAILEY, R. M. BAILEY, HER HUSBAND; NELLIE JOHNSON, JOHN JOHNSON, HER HUSBAND; JUANITA MILLINER, H. R. MILLINER, HER HUSBAND; IRWIN COUCH, MERLE COUCH, THERESA COUCH, HIS WIFE, AND H. R. MILLINER, ADMINISTRATOR OF THE ESTATE OF CARRIE COUCH, DECEASED,

Defendants in Error.

Syllabus

1. WATERS AND WATER COURSES—When, by migration and percolation, salt water passes beyond the boundary

of land under which it lies, ownership is then vested in owner of land under which salt water may be found.

Salt water contained in an underground formation or stratum is fugacious and migratory in its nature, and, like oil, gas and other fugacious minerals, is not the absolute property of the owner of the land under which it lies, unless reduced to possession by him. When, by migration or percolation, it passes beyond the boundary of the land under which it lies, the qualified ownership and right to reduce to possession are then vested in the owner of the land under which the salt water may be found.

2. SAME—Action for damages and to enjoin alleged underground trespass due to injection of salt water into abandoned well on adjoining property—Held, under facts in this case, there was no taking or damaging of property of adjoining landowner that would make the oil companies liable to him under provisions of the Constitution.

Where oil companies desirous of disposing of salt water produced from their wells by contract with the owner of a tract of land obtained the right to inject such salt water into an abandoned well upon said land, thereby forcing such salt water into an underground formation or stratum which likewise contains salt water, and the salt water so injected commingles with the salt water with which such formation is saturated, and migrates and percolates into that part of said formation underlying adjoining lands, without injury or damage to the owner of such adjoining lands, and without depriving him of the possession, use and enjoyment of his land, or any part thereof, or restricting him in the exercise of any right in connection therewith, there is no taking or damaging of the property of such adjoining landowner which would make the oil companies liable to him under the provisions of art. 2, section 23, of the Constitution. The governing principle in such case is that the oil companies, who in injecting salt water into such well stand in the shoes of the landowner upon whose land the well is located, could use the land for such lawful purposes, but would be liable

to the adjoining landowner for any injury or damage occasioned to him thereby.

Appeal from District Court, Oklahoma County;
A. P. Van Meter, Judge.

Action to enjoin alleged underground trespass due to the injection of salt water into an abandoned well on adjoining property, and for damages for the alleged unlawful trespass occasioned thereby. Judgment for damages for plaintiffs. Defendants appeal and plaintiffs cross-appeal as to that part of the judgment against them. Reversed, with directions to render judgment for defendants.

Earl Pruet and T. Murray Robinson, both of Oklahoma City (Wallace Hawkins, of Dallas, Tex., and W. R. Wallace of Oklahoma City, for Magnolia Petroleum Company; Wm. C. Liedtke, Russell G. Lowe, and Redmond S. Cole, all of Tulsa, for Gulf Oil Corporation; Ralph W. Garrett and Robert L. Imler, both of Tulsa, for Sinclair-Prairie Oil Company; Don Emery, Rayburn L. Foster, R. B. F. Hummer, and R. M. Williams, all of Bartlesville, and Harry D. Turner, of Oklahoma City, for Phillips Petroleum Company; W. H. Brown, of Oklahoma City, for Anderson-Prichard Oil Corporation; George Hazlitt, of Cleveland, Ohio, for Sohio Petroleum Company; and D. A. Richardson, of Oklahoma City, of counsel), for plaintiffs in error.

Cantrell, Carey & McCloud, of Oklahoma City, for defendants in error.

Mac Q. Williamson, Atty. Gen., Fred Hansen, First Asst. Att's Gen., amicus curiae.

LUTTRELL, J. This action was brought by L. T. Rosecrans and others as plaintiffs against the defendant the West Edmond Salt Water Disposal Association, and the oil companies composing such Association, all of whom were engaged in the production of oil in what is known as the West Edmond oil field. The amended petition of plaintiffs contained five causes of action. The first cause was for

ejectment; the second for injunction to prohibit a continuing trespass by defendants upon the land of plaintiffs; the third for a money judgment for mesne profits; the fourth for damages temporary in character to the land of plaintiffs, and the fifth for exemplary or punitive damages. The trial court overruled defendants' demurrer to the evidence as to the first, third, and fifth causes of action, and their motion for directed verdict at the close of all the evidence, and submitted the case to the jury on the first third, and fifth causes of action, withdrawing from the consideration of the jury the second cause of action, which sought an injunction, and sustaining the demurrer to the evidence as to the fourth cause of action. The jury returned a verdict for plaintiffs on the first, third, and fifth causes of action, but the verdict on the fifth cause of action for exemplary damages was, on motion for new trial, disallowed by the trial court, and judgment upon said fifth cause of action rendered in favor of defendants. Defendants appeal from the judgment of the trial court on the first and third causes of action, and plaintiffs cross-appeal from the action of the court in disallowing the verdict for exemplary damages.

Plaintiffs' amended petition in their first cause of action alleged that plaintiffs were the owners of a 160-acre tract of land located in Oklahoma County, and within the area of what is known as the West Edmond Oil Field or pool; that the defendants were injecting salt water in great quantities in a well located in the center of a 40-acre tract adjoining the land of plaintiffs on the west, and that the salt water so injected into said well was forced through the porous stratum into which it was injected and carried in an easterly direction into the stratum underlying the land of plaintiffs; that in so doing the defendants took the property of plaintiffs in said subsurface structure for their own benefit as a reservoir for the said salt water, and occupied the stratum to the exclusion of plaintiffs, and to their detriment. In the first cause of action they asked that the defendants be ejected from their land and the possession thereof restored to the plaintiffs. In their second cause of action they sought to enjoin the defendants from

continuing to inject salt water into said well. In their third cause of action they alleged that defendants had become liable to the plaintiffs for the mesne profits, or profits accruing to defendants by reason of the taking and detention of plaintiffs' land by forcing the salt water into it, and prayed for recovery of such profits. In their fourth cause of action they alleged that the acts of the defendants had resulted in physical damages to the property of plaintiffs, which could be remedied by the use of labor and money, and asked for the reasonable expense of restoring the property in the sum of $25,000. In the fifth cause of action they asked for punitive damages for the wanton, arbitrary and oppressive disregard of the rights of plaintiffs by the defendants.

In their answer defendants admitted that they were injecting salt water into said well, after having obtained the permission of the Corporation Commission and the State Planning and Resources Board to do so; denied that the salt water had migrated or percolated into the property of the plaintiffs, and further alleged that if, from the proof, it appeared that salt water injected into said well had migrated into the statum into which it was injected and under the land of plaintiffs, that no damage or injury was sustained by plaintiffs by reason thereof for the reason that the stratum into which the salt water was injected was saturated with salt water long prior to the time the defendants began the injection of salt water into said well. In their reply plaintiffs alleged that the Corporation Commission and the Planning and Resources Board were without legal power, authority, and jurisdiction to make any order which would deprive plaintiffs of their constitutional or legal rights asserted in this action, and that if given such effect said orders were void as violative of the Constitution of Oklahoma and the Constitution of the United States, and that the defendants were estopped to claim that said orders precluded recovery by plaintiffs.

From the evidence and the admissions of the parties it appears that the West Edmond Salt Water Disposal Association is a joint association composed of the individual

oil companies also made defendants in the action, and perhaps other oil companies, all of whom were producing oil in the West Edmond Oil Field or pool; that one of these defendants, Sohio Petroleum Company, held an oil and gas lease on the property of plaintiffs, upon which property no well had been drilled; that immediately west of the property of plaintiffs, in the center of a 40-acre tract adjoining the land of plaintiffs, was located an abandoned oil well known as the Robson Well, and that defendants purchased from the owners of that land the right or permission to inject into said dry and abandoned well, in a stratum or formation known as the Hoover-Tonkawa formation, salt water piped to said dry and abandoned well from other wells operated by defendants in the West Edmond Field, which were producing salt water in considerable quantities along with oil and gas. From the evidence it further appears that this Hoover-Tonkawa formation was a porous sand formation or series some 500 feet thick underlying the 40-acre tract upon which the abandoned well was located, and underlying also the land of plaintiffs and the entire West Edmond oil field, said formation being 4,500 feet below the surface of the land; that said formation was completely saturated with salt water, and that no oil or gas was being or could be produced therefrom.

It also appears that the abandoned well had been so plugged and cemented that all oil sands below and above the Hoover-Tonkawa formation were protected from the salt water injected into said well, so that there was no possibility that the injection of salt water into it would in any way injure any other formation or strata in said field from which oil or gas or fresh water was being or could be produced. The salt water was injected into the abandoned well with considerable force. The salt water encroachment on the West Edmond field, so far as the Hoover-Tonkawa formation was concerned, came from the west, so that any movement in the water confined in said formation would be toward the east, and the testimony of plaintiffs' witnesses was that the injection of the

salt water into the abandoned well caused a further or more accelerated movement of the salt water from the west to the east, so that a considerable portion of the salt water so injected would find its way under the land of plaintiffs. According to one witness almost half of the salt water so injected would migrate or percolate into the formation under the land of plaintiffs, displacing a similar amount of salt water which would be pushed further east. Plaintiffs did not give the defendants permission to so push or force their salt water into the formation under plaintiffs' land, but before the Corporation Commission and at all other times objected to the injection of salt water into said formation by defendants.

The evidence shows that the salt water in the Hoover-Tonkawa formation was confined to that formation by impervious shale or clay formations immediately above and below it, so that salt water contained in said formation could not seep or percolate into the strata above or below the said formation, and that the said formation was saturated with salt water and was of great extent, the actual boundaries thereof not being capable of accurate ascertainment. At the time of trial, June 9, 1947, the witnesses testified that the total volume of salt water injected into the well was some 4,156,370 barrels. One of the witnesses for plaintiff testified that this amount was trifling when compared to the vast amount of salt water contained in the Hoover-Tonkawa formation, testifying that it was comparable to dropping an eyedropper full of water into the ocean.

The plaintiffs produced no evidence tending to prove actual damages to their land or interference of any kind with the full use and enjoyment of the land by them. By one witness they offered to prove that the forcing of salt water into the said formation might eventually produce erosion and result in the cutting of channels or canals in the formation so that there would be a leakage of salt water from this formation to the sands below them. This offer was denied by the trial court. It is conceded that the defendants had not invaded, trespassed upon, or taken pos-

session of the land of plaintiffs, or any portion thereof save and except by the injection of salt water into the said formation and its migration or percolation into that portion of the formation which underlies the land of plaintiffs.

The decisive question presented for determination is whether the owner of land, who injects, through a well upon his premises, salt water into an underground stratum which contains nothing but salt water, which salt water so injected, commingling with the salt water in said stratum, migrates or percolates into the portion of said stratum underlying the land of his neighbor, thereby trespasses upon the lands of his neighbor, or takes wrongful possession of the portion of such stratum underlying the land of his neighbor, so as to become liable to his neighbor therefor, although no actual damage is inflicted upon or suffered by his neighbor, nor is he deprived of any right pertaining to, or consistent with, the full and complete use, occupation, or enjoyment of his land.

While it is true that the defendants in this action do not own the land upon which the Robson well is located, they have a derivative right to inject salt water into said well, and the standard of the legality of their act is the extent of the right of the owner of the land who granted such right to them. *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 172 P. 2d 1002.

We say this is the decisive question presented, since all the contentions of the plaintiffs in this action, as enumerated above and set forth in their various causes of action, are based upon or claimed to arise from what they contend is a trespass upon and taking possession of their land or a portion thereof by the injection of salt water in the Robson well, and its subsequent migration under the land of plaintiffs.

The question is one of first impression, not only in this court, but in the courts of last resort of the United States. Counsel frankly state that their research has failed to disclose any case decided by any court of last resort determinative of this question, and we have failed to find any. The case has been exhaustively briefed and orally argued by

the parties. The Attorney General of the state has filed a brief amicus curiae on behalf of the state, calling attention to the large production of salt water as a necessary incident to the production of oil and gas; the detriment to the state and its citizens occasioned by permitting this salt water to get into the streams, lakes or fresh water strata in the state; the fact that underground disposal in salt water bearing formations is rapidly becoming a common practice in oil producing states, and is the most logical and sensible solution of the problem of salt water disposal, and stating that if such disposal of salt water is forbidden unless oil producers first obtain the consent of all persons under whose lands it may migrate or percolate, underground disposal would be practically prohibited. The defendants and the Attorney General unhesitatingly admit and affirm the liability of the defendants or other oil producers disposing of salt water by injection into underground formations for any actual damage or injury resulting therefrom to adjoining property owners. But they assert that the mere injection of salt water in the Robson well, and its migration into the salt water bearing formation underlying the land of plaintiffs, does not in itself, absent any injury or damage to the land of plaintiffs, or any deprivation of their right to use, occupy, and enjoy their lands, constitute an unlawful or wrongful trespass upon or taking possession of the land of plaintiffs or any portion thereof in such fashion that plaintiffs could maintain ejectment against them, or could maintain an action for mesne profits, or could enjoin them on the theory of a continuing trespass. They assert that the only liability of the defendants is a liability for actual damage or injury to the land of plaintiffs, or the deprivation of some right previously vested in plaintiffs to use, occupy, and enjoy their property fully and completely.

Careful consideration of the authorities cited in the briefs of the respective parties, and other authorities examined by us, convinces us that the contention of the plaintiffs is untenable; that the defendants have not trespassed upon the land of plaintiffs, nor taken possession of any

part thereof, nor deprived the plaintiffs of any right in the full and complete possession and use of their property, and that the contention of defendants that they are liable only for actual damage suffered by plaintiffs resulting from the injection of salt water into said well must be sustained.

The contention of plaintiffs is apparently bottomed upon the assumption that the salt water injected into the Robson well by defendants, being at that time the property of defendants, remained their property after it was injected into said well and after it was commingled with the salt water already contained in the Hoover-Tonkawa formation, and that when, by migration or percolation, it passed beyond the boundaries of the land upon which the Robson well was located and entered that portion of said formation which underlay the land of plaintiffs, it still remained the property of defendants, and that thereby defendants, without the consent of plaintiffs, used the land of plaintiffs as a storage place or reservoir for salt water belonging to defendants. Based upon this assumption they contend that they were entitled to a judgment ejecting the defendants from the possession of their property, and giving to the plaintiffs damages measured by the profits or saving received or effected by defendants, resulting from the storing of their salt water upon the lands of plaintiffs instead of disposing of it otherwise.

Under all the authorities we have been able to find upon the subject, the assumption that the salt water remained the property of defendants after it permeated or penetrated into the Hoover-Tonkawa formation underlying the land of plaintiffs is incorrect. In Willis' Revision of Thornton on the Law of Oil and Gas, Vol. 1, p. 78 § 40, the author, quoting from *Westmoreland* v. *DeWitt*, 130 Pa. 235, 18 Atl. 724, 5 L.R.A. 731, says:

> "'Water and oil', said the court, 'and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals, ferae naturae. In common with animals, and unlike other minerals, they have the power and tendency to escape without

the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain'. They belong to the owner of the land and are part of it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone.' "

In Tiffany on the Law of Real Property (3d Ed.) Vol. 3, p. 176, § 746, the author says:

> "When percolating waters escape and go into land, or come into another's control, or reach a natural channel, whatever rights the owner of the land from which they passed may have had in them, because in his land, are ordinarily lost."

To the same effect are 67 C.J. p. 834, § 250; 56 Am. Jur. p. 594, § 112; *Rock Creek Ditch and Flume Co.* v. *Miller*, 93 Mont. 248, 17 P. 2d 1074. In this respect water resembles oil, gas, or any other mineral fluid in nature, or of such character that by a well drilled on one tract of land it may be drawn from adjoining lands and become the property of the owner of the well when reduced to his possession.

Plaintiffs urge that this rule of law governing minerals of a fugacious nature should not be applied to deleterious substances, but should apply only to valuable minerals, and that the application of this rule to salt water and similar substances, which may be disposed of by one landowner by forcing it upon or into the land of another is abhorrent to any sense of justice. We are unable to see why value should be a criterion for the application of the rule announced in the above authorites to fugacious substances. And further, if the formation into which such valueless substance is injected is already filled with a similar or identical valueless substance, a portion of which is displaced by the water migrating from the lands of the defendants into and under the lands of the plaintiffs, we are unable to see where any injustice has been done to plaintiffs, or the value of their property or their rights

in their property in any wise diminished. If the substance were of value they could, by penetrating the formation with wells drilled upon their own land, acquire the ownership of such substance, although it originally came from the land of defendants. *Hammonds* v. *Central Kentucky Natural Gas Co.*, 255 Ky. 685, 75 S.W. 2d 204; *Utah Copper Co.* v. *Stephen Hayes Estate*, 83 Utah, 545, 31 P. 2d 624.

In the latter case the Utah Copper Company removed from its mines great quantities of low grade copper ore which it deposited upon its own land adjacent to a gulch or ravine extending down the mountain side. This copper ore was soluable in water and rains and snows falling upon the piles of ore and saturating them carried away considerable quantities of the ore in solution, and seeped and percolated to other lands owned by the Copper Company, where the waters were recaptured and the ore extracted therefrom. The defendants in that action owned a small tract of land between the mining property of plaintiffs and the property belonging to them where the water containing the soluable ore was recaptured, and the Copper Company sought to condemn this property so as to prevent the owners thereof from capturing the water carrying the ore in solution, claiming that the water at all times remained the property of the Copper Company, regardless of the fact that for a part of the distance between the mine and the place where the water was recaptured it percolated under the land of the defendants. The Utah court denied the right of the Copper Company to condemn the land, saying:

> "It is settled law in this state, and, so far as we know, it is the law everywhere, that the ownership of such waters is vested in the owner of the soil through or in which they seep and percolate. This is so because they are a part of the land itself."

citing numerous authorities. The mere fact that a fugacious substance is not valuable does not justify us in making it an exception to the general rules governing the migration and ownership of such substances.

Plaintiffs call attention to *Butler* v. *Frontier Telephone Co.* 186 N.Y. 486, 79 N.E. 716, as supporting their right to maintain ejectment, and their contention that the defendants are in wrongful possession of their property. In that case the defendant Telephone Company, without permission from the plaintiff, strung a telephone wire across the plaintiff's premises, and the court held that the plaintiff was entitled to judgment for the removal of said wire and that ejectment was a proper remedy; that the maintenance of said telephone wire across his land deprived him of the full and complete possession thereof, since he was the owner of the land from the center of the earth to the sky above, and that the maintenance of said wire, the property of defendant, across his property without his consent was to that extent possession of his property. The distinguishing feature in this case is that the telephone wire at all times remained the property of the defendant, while in the instant case the water, when it escaped from the land upon which the well was situated and entered the land of plaintiffs, ceased to be the property of defendants.

In *Canada* v. *City of Shawnee,* 179 Okla. 53, 64 P. 2d 694, a case involving the right of the city to draw fresh water from under the land of plaintiff by the drilling of wells near his property and taking the water for its own use to the injury and damage of the water supply of plaintiff, it was not necessary to determine whether there was ownership in place of percolating water, or that ownership thereof was dependent upon reducing it to possession, since actual injury and damage was sustained by Canada. We there said:

> "If the theory of ownership of percolating water is that of ownership in place, it is self-evident that the defendant should be enjoined. If the theory is that of ownership by capture, such as is usually applied in exploration for oil, it still is not at all necessary that we blindly follow such theory to such extremes as will lead to gross injustice to innocent persons. We make no attempt to reconcile the result herein with the law of oil and gas, other than to point out that if oil had

been sucked from beneath plaintiffs' property their land as land, and their farms, as farms, and their live stock, and their personal health and sanitation could not have thereby become impared, while the opposite must happen if they are deprived of water. And still less are we inclined to countenance such a result when the life-giving water, so extracted, is pulled from beneath the neighbor's land for sale at a distance."

In *Sunray Oil Co.* v. *Cortez Oil Co.*, 188 Okla. 690, 112 P. 2d 792, Cortez sought to enjoin Sunray from disposing of salt water by injecting it into an abandoned well upon a tract of land in which Cortez owned an interest in the minerals. In that case Cortez did not show any actual damage to its mineral interest, but argued that there was a possibility that the salt water placed in the disposal well might find its way into an oil or gas bearing sand, which would result in injury to the mineral interest of Cortez. We held that the evidence failed to show any probability that any possible oil or gas producing formation existed in the land in question which would be materially affected to the detriment of Cortez by the injection of salt water into the well. In that case, referring to the rights of the owner of the land, we said:

"In *Tidal Oil Co. et al.* v. *Pease, et al.*, 153 Okla. 137, 5 P. 2d 389, 393, in discussing the question of disposal of salt water, it is said: 'Subject to the rules of law with reference to due care, etc., the owner of land ought not to be prohibited from the full use and benefit (of his land) so long as he does not by such use injure or damage other persons.'

"So in this case Genevieve Greer, being the owner of the land, subject only to the oil and gas lease, and subject to the one-fourth interest in the oil and gas and other mineral rights, owned by plaintiff, has the right to so use the surface and substrata of her land as she sees fit, or permit others so to do, so long as such use does not injure or damage other persons."

Plaintiffs also rely upon article 2, sec. 23 of the Constitution, providing that no private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, citing *City of Muskogee* v. *Hancock*, 58 Okla. 1, 158 P. 622; *Fairfax Oil Co.* v. *Bolinger*, 186 Okla. 20, 97 P. 2d 574; *British-American Oil Producing Co.* v. *McClain*, 191 Okla. 40, 126 P. 2d 350, and other authorities. In all these cases, however, actual physical damage to the property of plaintiffs was shown, such as injury due to vibration caused by the drilling of a well for oil and gas, or by explosions in the laying of pipe lines or sewers, or detriment to and reduction of the usable value of their property, because of annoyance and inconvenience to the property owners or their tenants due to noxious odors. In these cases we held that where such damage or injury was shown recovery could be had under the constitutional provision whether the use of defendant's property causing the injury was negligent or not, or was reasonable or unreasonable, if damage was occasioned to the plaintiff's property thereby. As stated above, defendants admit and agree that in the event their injection of salt water into the well should in any way injure or damage plaintiffs, they would be liable in damages for such injury, and plaintiffs would be entitled to recover therefor. In the instant case, plaintiffs did not contend, and made no effort to prove, that any damage had resulted to them by the injection of salt water into the Robson well.

In *Martin* v. *British-American Oil Producing Co.*, 187 Okla. 193, 102 P. 2d 124, the oil company constructed a pipe line from the Oklahoma City oil field to a point in the North Canadian river near the land of plaintff and discharged into the Canadian river large quantities of water. The trial court instructed the jury that the act of defendants in pumping excess water into the river was not itself an unlawful act, and became unlawful only when done in such a manner as to constitute an unreasonable use of the river and the proximate cause of injury to the rights of another. We held that the instruction was correct. We there approved the rule stated in *Chicago, R. I. & P. R. Co.* v. *Groves*, 20 Okla. 101, 93 P. 755, and other cases, that

every proprietor of land through which water flowed in defined channels so as to constitute a water course had the right to insist that the water should continue to run as it has been accustomed, and that no one can change or obstruct the course of such stream injuriously to such landowner without being liable in damages. We held that it was well settled that it was the right of a riparian owner to have the stream substantially preserved in its natural size, flow, and purity, and that he was entitled to protection against material diversion or pollution of the water of such stream. We said in that case that the issue was not whether the defendants lawfully or unlawfully pumped excess drilling water into the river, but whether the water so pumped carried with it drilling mud, base sediment and other deleterious materials which formed a dam in the river and caused the water to wash away and destroy plaintiffs' land.

In the instant case, conceding that the salt water injected into the Robson well would migrate into the Hoover-Tonkawa formation under the land of plaintiffs, the only effect of such migration, according to the testimony of plaintiffs' own witnesses, was to displace a similar amount of salt water in said formation and cause it to migrate further east. Under this testimony, the formation being already saturated with salt water, the acts of defendants did not increase the amount of salt water under plaintiffs' land or render it any more deleterious or detrimental to plaintiffs' land than it had been before. If, instead of being contained in an underground stratum, the salt water in the Hoover-Tonkawa formation had formed a large nonnavigable lake covering in part the lands of defendants and plaintiffs, and other lands in the vicinity, and the defendants had upon their own land pumped additional salt water into said lake, which did not raise its level, or occasion any injury to plaintiffs, or damage to their property, but simply displaced a certain amount of salt water in the lake which was carried away by the outlet therefrom, could it be said that plaintiffs as owners of the bed of the lake in front of their lands had been deprived of the possession of the lake bed owned by them, or that the act of defendants in running

salt water into the lake upon their own premises was a trespass upon or invasion of the possession of plaintiffs? We think not. Under the facts in this case there was no taking or damaging of the property of plaintiffs which would bring them within the provisions of art. 2, section 23 of the Constitution.

The applicable and governing principle in this case is the rule of reasonable use, that is, that a person may use his property in any lawful manner, except that he must not use it so as to injure or damage his neighbor. In *City of Muskogee* v. *Hancock, supra,* it is stated as follows:

> "The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property, so that each in exercising his right must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnable in the necessities of the social state, that its vindication by argument would be superfluous."

This principle was announced and adhered to in *British-American Oil Producing Co.* v. *McClain, supra; Sunray Oil Co.* v. *Cortez Oil Co., supra,* and *Chicago, R. I. & P. R. Co.* v. *Groves, supra.* Measured by this rule, we find that the act of the defendants in injecting salt water into said well was lawful, and that in the exercise of such right defendants did not take the property of plaintiffs or any part thereof, or injure or damage same, or deprive the plaintiffs of any rights in connection therewith. This being the case, there was no basis or foundation upon which plaintiffs could maintain any of the causes of action asserted in their petition, and the motion for directed verdict made by the defendants at the close of all the evidence should have been sustained.

Reversed, with directions to set aside the verdict of the jury and render judgment for the defendants.

DAVISON, C.J., and WELCH, GIBSON, HALLEY, JOHNSON, and O'NEAL, JJ., concur.

APPENDIX "B"

Filed in Supreme Court of Oklahoma December 19, 1950,
Andy Payne, Clerk

IN THE

SUPREME COURT OF THE STATE OF OKLAHOMA

No. 33,712

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, A JOINT ASSOCIATION; PEPPERS REFINING COMPANY, A CORPORATION; SKELLY OIL COMPANY, A CORPORATION; SOHIO PETROLEUM COMPANY, A CORPORATION; STANOLIND OIL AND GAS COMPANY, A CORPORATION; MAGNOLIA PETROLEUM COMPANY, A CORPORATION; MID-CONTINENT PETROLEUM CORPORATION, A CORPORATION; ANDERSON-PRICHARD OIL CORPORATION, A CORPORATION; SINCLAIR-PRAIRIE OIL COMPANY, A CORPORATION; PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND GULF OIL CORPORATION, A CORPORATION,

Plaintiffs in Error,

vs.

L. T. ROSECRANS, MARY B. ROSECRANS, J. M. BAILEY, ADMINISTRATOR OF THE ESTATE OF MARY A. ROSECRANS, DECEASED; WANDA M. BOYD AND HER HUSBAND, JOHN H. BOYD; ALVA W. ROSECRANS AND HIS WIFE, FRANCES V. ROSECRANS; VERNIA L. BENNE AND HER HUSBAND, JOHN BENNE; GLENN H. ROSECRANS AND HIS WIFE, ANNA M. ROSECRANS; MAUDE BAILEY, R. M. BAILEY, HER HUSBAND; NELLIE JOHNSON, JOHN JOHNSON, HER HUSBAND; JUANITA MILLINER, H. R. MILLINER, HER HUSBAND; IRWIN COUCH, MERLE COUCH, THERESA COUCH, HIS WIFE, AND H. R. MILLINER, ADMINISTRATOR OF THE ESTATE OF CARRIE COUCH, DECEASED,

Defendants in Error.

Petition for Rehearing and Brief in Support Thereof

On July 11, 1950, this Court filed and entered its opinion and decision in the above styled and numbered cause by

which it held that defendants in error have no right of recovery of any kind or character against plaintiffs in error on account of the admitted acts of the latter in taking and using property of the former against their will and without compensation.

This opinion and decision of this Court is one of grave importance and of serious and far-reaching import to all property owners in Oklahoma. It announces a new concept of "property" and of "eminent domain." If finally approved, it establishes an innovation in Constitutional Law as the latter involves "due process."

Petition in Error

Defendants in error respectfully petition the Court to grant a rehearing of this cause and thereupon to further consider same, with oral argument if desired, followed by vacation or withdrawal of the opinion and decision of July 11, 1950, which reversed the judgment of the District Court of Oklahoma County with directions, followed by the filing and entry of a new opinion and decision affirming said judgment in part and reversing same in part as originally sought by these defendants in error.

Defendants in error respectfully allege that there is grievous error in the opinion and decision aforesaid, that same is basically and fundamentally unsound in law and in fact, and that said opinion and decision is contrary to the Constitution of the United States as well as that of the State of Oklahoma and to the statutes and law otherwise applicable.

The grounds for this application for rehearing are both legal and factual. They will be separately presented herein under two headings: I. Constitutional and Legal Errors, and II, Factual Misconceptions.

These will then be supported and discussed in the Brief appended hereto, incorporated herein and made a part hereof by reference.

I

Constitutional and Legal Errors

The opinion and decision of July 11, 1950, is legally wrong because:

(1) The Oklahoma Constitution and statutes as interpreted and construed by the Court in this cause are in conflict with the Fourteenth (XIV) Amendment to the Constitution of the United States;

(2) In determining the orders of the Corporation Commission of Oklahoma and of the Oklahoma Planning and Resources Board to be constitutional authority for the acts herein complained of by defendants in error, this Court has necessarily decided this cause upon the sole basis of upholding the constitutionality of these statutes as against the claim of the plaintiffs that they violate the Fourteenth (XIV) Amendment to the Constitution of the United States, thus rendering this cause appealable to the Supreme Court of the United States as a matter of right if this petition for rehearing be denied;

(3) The court necessarily turned its decision upon the federal constitutional question and thus erroneously decided a federal question involving the constitutionality of state laws adverse to plaintiffs' claims of the unconstitutionality of such state laws;

(4) The Court in its opinion in this cause has construed the Constitution of Oklahoma and the laws of said state in such a way that they necessarily conflict with the Fourteenth (XIV) Amendment to the Constitution of the United States;

(5) So construed, the necessary effect of said constitution and statutes is to take the property of defendants in error for public use without just compensation in violation of the guarantees contained in the Fourteenth (XIV) Amendment to the Constitution of the United States;

(6) So construed the necessary effect of said Constitution and statutes is to deny to defendants in error equal

protection of the laws in violation of the guarantees contained in the Fourteenth (XIV) Amendment to the Constitution of the United States;

(7) So construed, the effect of said Constitution and statutes is to deny due process of law to defendants in error in violation of Section 7, Article II of the Constitution of the State of Oklahoma;

(8) So construed, the necessary effect of said Constitution and statutes and of said decision of this Court is to take the property of defendants in error for private use without the consent of the owners thereof, notwithstanding the fact that the plain language of Section 23 of Article II of the Oklahoma Constitution expressly forbids such taking;

(9) So construed, the said Constitution and statutes and said decision take the property of defendants in error for public use without compensation, notwithstanding that the plain and unambiguous language of Section 24 of Article II of the Oklahoma Constitution expressly forbids same;

(10) The decision of this Court judicially provides for condemnation of plaintiffs' property for public use without compensation in the absence of any legislation authorizing same and in the face of authoritative decisions of this Court saying that such can't be done;

(11) The decision erroneously holds that no property right is taken or invaded if an intentional unauthorized use is made of it for private gain without physical injury;

(12) The decision erroneously holds that a property owner has no right to exclude another from the use of his property if the owner can't use it and the use won't hurt it;

(13) The Court holds erroneously, and for the first time in the judicial history of America, that the exclusive right to sell the use of property is not property and cannot be protected;

(14) The Court erroneously treats the salt water invasion of plaintiffs' land as one from "migrating" or "percolating" or "seeping" waters when the uncontradicted facts of record are that the waters were gathered and deliberately, and with advance knowledge, forced or "cast" into plaintiffs; land by defendants for the express purpose of

disposing of them at a profit to defendants of at least ten cents per barrel. The Court wholly fails to make the differentiation here required by the law of Trespass and the law of Waters and Water Courses;

(15) The Court erroneously misconceives the effect of "title" to the waters. Such is wholly immaterial. The thrown rock is abandoned when thrown as far as "title" is concerned. Likewise, the fired missile from the gun. Likewise, the garbage or refuse dumped from the truck. Likewise, the scattered debris or materials from an explosion. Likewise, the surface waters deliberately released and cast over another's land. It is unsound and even specious to say that the question of who owns the instrumentality of a trespass has anything whatever to do with the legal liability for its wrongful use. My car could be borrowed and deliberately driven against your house and the actor would be a trespasser. Neither could I escape the consequences of the trespass by relinquishing the title to you at the borderline of your property if I deliberately set my car in motion toward your home;

(16) The Court overlooked controlling decisions of this Court and of the Supreme Court of the United States, which decisions establish the above points;

(17) The Court misconceived and misapplied the uncontradicted facts of record as above noted; and

(18) Controlling decisions were not cited to the Court but are now presented in the appended Brief.

II

Factual Misconceptions

While, in the main the controlling facts in this cause are accurately stated in the opinion, there are some important respects in which inadvertent overstatement or understatement of the facts may be demonstrated to be very relevant. Factual misconceptions indicated upon the face of this Court's opinion may be suggested respectfully as follows:

(1) In the opinion the Court states that the plaintiff's claim of trespass is based upon "the injection of salt water

in the Robson well and its subsequent migration under the land of plaintiffs." This statement is factually incorrect. These were not "migrating" or "percolating" or "seeping" waters. The uncontradicted evidence shows that these waters didn't naturally flow, migrate, percolate or seep into plaintiffs' land even after they were placed in the disposal well. The uncontradicted evidence shows that they were forced into plaintiffs' land by the direct, deliberate and intentional act of defendants, and that these waters were forced into plaintiffs' land by the pressure applied by defendants to that water at the disposal well. As we count them, there are fourteen (14) separate references in the opinion to "migrating, percolating, and seeping" waters. The opinion contains statements revealing the true facts as indicated above but the constant reiteration in the opinion of the thought that these were "migrating waters" would seem to indicate in itself the conflict in the opinion, and the importance to the cause of the proper concept of these waters. More will be said of this in the Brief supporting this petition;

(2) The opinion does not state the well-established fact of record that these defendants knew in advance of the disposal of this salt water, that if they put this salt water in this disposal well under pressure, it would surely and certainly be forced into the sub-strata of plaintiffs' land. The omission of this uncontradicted fact from the opinion is important;

(3) The Court states in its opinion:

> "The plaintiffs produced no evidence tending to prove actual damages to their land or interference of any kind with the full use and enjoyment of the land by them."

We suggest that as a mixed question of fact and law, this statement is erroneous as will be shown in the Brief appended hereto. But, in addition, we suggest that the statement is factually erroneous in that the record shows that plaintiffs did prove actual physical injury to their substrata (see C-M. Vol. I, p. 252). They proved that it would

cost at least $25,000.00 to restore their land to the condition in which it was before the invasion by defendants (See C-M. Vol. I, pp. 251-252). And, as hereinafter shown, the "use and enjoyment of the land" by plaintiffs certainly included the right of plaintiffs to exclude strangers from its use in order that plaintiffs might sell its use to those desiring it for a bargained consideration;

(4) The Court states in its opinion that plaintiffs concede that they were injured in no wise except by the "migration or percolation" of the salt water into their land. We respectfully suggest that plaintiffs made no such concession and never at any time conceded that there was any "migration or percolation." Plaintiffs always contended that the uncontradicted evidence showed that the water was cast into the land;

(5) The Court states—again as a statement of mixed law and fact—that plaintiffs were not "deprived of any right pertaining to, or consistent with, the full and complete use, occupation, or enjoyment" of their land. We shall demonstrate hereafter that this statement is not true, either as a matter of fact or as a matter of law, because deprivation of any of these rights of "ownership" does interfere with the "full and complete use and enjoyment" of such ownership;

(6) The Court states in the opinion:

> "Counsel frankly state that their research has failed to disclose any case decided by any court of last resort determinative of this question, * * *."

If counsel for plaintiff ever made any such statement, we are not aware of it. If such statement has been inadvertently made, it is now withdrawn because these counsel earnestly represent to the Court that they believe that the cases cited by them are squarely determinative of the question posed by the Court contrary to the answer which this Court has given;

(7) Again the Court repeats that the admitted acts of the defendants have not "deprived the plaintiffs of any right in the full and complete possession and use of their prop-

erty * * *." Plaintiffs respectfully suggest that this statement flows from a misconception of what is included within the ownership and use of property. This will be demonstrated hereafter;

(8) The Court uses three pages of its opinion in a discussion of who owned the title to the destructive waters after they passed beyond the boundaries of the property in which the Robson well was located. As pointed out above, such discussion is futile because it doesn't make any difference who owns the instrumentality which does a wrong. The test is who or by what agency it is set in motion or caused to do the wrong. And here again in this discussion by the Court is focused the erroneous assumption that these were naturally flowing, migrating, percolating or seeping waters. As we have pointed out above, they were not such;

(9) The Court says in the opinion:

> "We are unable to see where any injustice has been done to plaintiffs or the value of their property or their rights in their property in any wise diminished."

We shall demonstrate in the Brief to follow just how wrong the Court is in both respects mentioned in this statement. Briefly stated, we say that if plaintiff had something to sell (an underground easement in their land for storage and passage of salt water), which was theirs, and which only they had a right to sell, the unauthorized, forceful and surreptitious taking of the use of such property without consent or compensation would certainly work an injustice upon the owners of the property and would certainly diminish the value of the rights in that property;

(10) The Court states in the opinion that the plaintiffs "made no effort to prove that any damage had resulted to them by the injection of salt water into the Robson well." This statement, wrong in our judgment, shows the misconception of the Court as to the nature and character of the *rights* involved in this cause and the Court's very narrow concept of the word "damage." One certainly suffers "damage" if he is deprived of a valuable property right even though the physical thing which is the subject of that

property may not be physically injured. Illustrations of this could be piled miles high. For instance, one suffers a "damage" when an unauthorized use is made by another of his property for the gain of such other without compensating the owner. If one uses my vacant lot for a storage lot in the course of his business, I have suffered a damage if I am not compensated for such use even though the lot may be ultimately left in as good condition as it was. Further discussion of this will follow.

We believe that in any event this Court should modify or supplement its opinion of July 11, 1950, to state the facts to which attention is called above fully and correctly in accordance with the record. This is particularly important even though this petition for rehearing be denied by this Court since in that event, an appeal to the United States Supreme Court will be taken and no transcript of the trial in the Court below or of the evidence there adduced will then be necessary and the questions of law can then be made fully to appear from the face of this Court's opinion alone.

For the reasons above stated and upon the argument contained in the original Briefs of the defendants in error, as hereinafter referred to, and in the Brief appended hereto, it is submitted that this petition for rehearing should be granted.

Respectfully,

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Brief in Support of Petition for Rehearing

For the purpose of this rehearing, the scope of this cause is now reduced by the opinion of this Court to one major question involving basic and fundamental American philosophy:

What is property and to what protection is it entitled? This is the irreducible minimum.

The Court's opinion in this case is fair in its treatment of a troublesome subject matter. It is candid and forthright. But it is erroneous.

And it is not quite accurate in some respects which have been noted and which are vital to a correct decision of the cause. These will be elaborated upon hereinafter. Defendants in error will present their argument in support of the several assertions of error made in their petition above under five points as follows:

Point One

The Oklahoma Constitution and statutes as interpreted and construed by the Court in this cause are in conflict with the Fourteenth (XIV) Amendment to the Constitution of the United States.

Point Two

Property of plaintiffs is taken by defendants.

Point Three

Property of plaintiffs is taken without Due Process of Law.

Point Four

Plaintiffs are denied Equal Protection of the Laws.

Point Five

No "migrating" or "percolating" or "seeping" waters are here involved, and defendants were guilty of trespass.

We now present these points in the order stated.

Point One

The Oklahoma Constitution and statutes as interpreted and construed by the Court in this cause are in conflict with the Fourteenth (XIV) Amendment to the Constitution of the United States.

The origin of the right and authority for plaintiffs in error to commit the acts complained of and admitted by them is claimed by plaintiffs in error and necessarily found by the Court to rest in Order No. 17881 of the Corporation

Commission of Oklahoma, dated June 4, 1945 (Exhibit "2" to Answer of defendants) or Order No. 3-45 of the Oklahoma Planning and Resources Board, dated June 14, 1945 (Exhibit "4" to Answer of defendants) or both. Plaintiffs claimed in their petition (C-M. 60) that the exercise of such alleged "rights" by defendants violates the Federal Constitution and plaintiffs expressly asserted in their Reply (C-M. 139) the invalidity of such orders as violative of the Federal Constitution. The constitutionality of such orders, which are in reality statutes of the State of Oklahoma, is sustained and decided by this Court's opinion. In this, the Court erred.

The Oklahoma Constitution was designed and intended to be subservient to and to give effect to the constitutional guarantees and protectives contained in the United States Constitution. To that end it is provided in Section 1, Article I of the Constitution of Oklahoma that the "Constitution of the United States is the supreme law of the land", and particularly is the sacred right of individual property, guaranteed (against State action) in and by the Fourteenth (XIV) Amendment to the United States Constitution, sought to be made doubly secure by the plain terms of Sections 23 and 24 of Article II of the Oklahoma Constitution which provide that no private property shall be taken for private use without the consent of the owner or for public use without just compensation.

But, as we see it, the construction here is to the effect that these Oklahoma constitutional provisions do not apply to this kind of property, and by necessary inference that they permit its taking for either private or public use without compensation, so that they are in direct conflict with the Fourteenth (XIV) Amendment guaranteeing due process and equal protection of the laws. It must be upon this hypothesis that the order (statutes) above referred to are upheld and sustained. But the Federal Constitution is all-inclusive in its description of that which is protected. It protects "life, liberty and property"—all kinds, all amounts and all values. It excludes none. It leaves none beyond the pale of such protection.

Without doubt, as we demonstrated in our original Answer Brief at pages 72 to 76, to which reference is now made, and which we urge the Court to reread at once, and as we will show hereinafter under Point Two of this Brief, plaintiffs in error took "property" of defendants in error.

The Oklahoma Constitution and statutes aforesaid as so construed by this Court are thus unconstitutional for two reasons:

(1) They deny due process, and
(2) They deny equal protection of the laws.

But this Court said:

> "* * * we find that the act of the defendants, in injecting salt water into said well was lawful, and that in the exercise of such rights defendants did not take the property of plaintiffs or any part thereof or injure or damage same or deprive the plaintiffs of any rights in connection therewith."

As stated in this Court's opinion, the defendants themselves are irrevocably committed to the proposition that if they did injure or damage plaintiffs in any way, they would be liable. As to this, the Court says in the opinion:

> "As stated above, defendants admit and agree that in the event their injection of salt water into the well should in any way injure or damage plaintiffs, they would be liable in damages for such injury and plaintiffs would be entitled to recover therefor."

So we demonstrate our major premise that the sole question now for decision is whether or not property of plaintiffs has been taken for the private use of the defendants or for public use through the instrumentality of the defendants. The constitutional questions here presented will be discussed and argued hereafter under Points Three and Four, but, first, we shall seek to convince the Court that that which the defendants have used constituted "property" belonging solely to plaintiffs.

Point Two

Property of plaintiffs is taken by defendants.

That which we believe to be a complete misconception upon the part of this Court as to the "property rights" and "property" belonging to the plaintiffs is crystallized when one considers together the following quotations from this Court's opinion, the Court saying among other things:

> "We are unable to see where any injustice has been done to plaintiffs or the value of their property or their rights in their property in any wise diminished."

It is here to be noted that the Court recognizes the broad property right of the plaintiffs as owners in fee simple of their land, which necessarily includes ownership to the center of the earth, as provided by our statute.

Speaking of plaintiffs and their rights, the Court stated that the plaintiffs were not:

> " • • • deprived of any right pertaining to or consistent with the full and complete use, occupation, or enjoyment"

of their land and that the defendants had not:

> " • • • deprived the plaintiffs of any right in the full and complete possession and use of their property."

The Court further misconceives the legal result of the evidence when it states:

> "The plaintiffs produced no evidence tending to prove actual damages to their land or any interference of any kind with the full use and enjoyment of the land by them."

And further:

> "In the instant case plaintiffs did not contend and made no effort to prove that any damage resulted to them by the injection of salt water into the Robson well."

Even under the narrow concept of "damage" (Physical injury to the land), this statement is in error as pointed out above. But such narrow concept is improper since plaintiffs sustained damage if they were deprived of any right in connection with or incident to or a part of the ownership of the land.

This misconception is also carried forward by the Court in discussing the right of one to use his own land, the Court saying that he can make any reasonable use of his own land:

> " • • • except he may not use it so as to injure or damage his neighbor."

And here we point out that the uncontradicted proof in this case is to the effect that defendants were not restricting their "use" to their own land. They were not actually using their own land except as a means of making an unauthorized use of their neighbor's land. The whole object and purpose of the vast gathering system which defendants had built for the purpose of collecting this salt water from many wells over a wide area was to bring it to the mouth of the Robson well, to inject it into that well under pressure, to force it into and across the lands of plaintiffs and thus to make use of their lands for passage and storage of salt water which defendants were thus disposing of at a profit to themselves.

The following discussion should make clear that the American concept of "property" as embodied and announced in all its basic laws, the constitutions and statutes of its various states, and the vast body of court decision is much broader than the narrow concept adopted by this Court in its opinion herein. In truth, what this Court has done has been to "carve out" of the whole of plaintiffs property an important, real and vital segment or portion thereof, and by merely saying so placing that segment in a "no man's land" of unprotectible property.

The idea that physical injury is essential to the commission of a tort with respect to property is abhorrent to the American concept of the rights of the individual. Why, it is fundamental with respect to personal property (al-

ways of less dignity and sanctity than realty) that "any act of dominion inconsistent with the rights of the owner is conversion" and thus an actionable tort. Would this Court announce a less favorable rule for the protection of rights in realty?

Our concept of the meaning of the word "property" is so basically and fundamentally established and is so entirely different from the concept adopted by the Court in its opinion herein that we believe that the mere quotation of excerpts from a leading legal reference work would be entirely adequate to cause the Court, upon reflection, to change that concept which it has adopted. The following quotations from 42 American Jurisprudence at the pages indicated would seem to be sufficient to accomplish this purpose:

> "In its strict legal sense 'property' signifies that dominion or indefinite right of user, control, and disposition which one may lawfully exercise over particular things or objects;" (Page 187).
>
> "It is generally used in this sense in the constitutional guaranties against deprivation of property without due process of law. As so used, the word signifies the sum of all the rights and powers incident to ownership." (Page 188).
>
> "Property, as heretofore defined, is composed of certain constituent elements, to-wit, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. Of these elements the right of user is the most essential and beneficial. Without it all other elements would be of little effect, since if one is deprived of the use of his property, little but a barren title is left in his hands. This right of free and untrammeled user for legitimate purposes is fundamental and within the protection of the Federal Constitution." (Page 189—Emphasis ours.)
>
> "This element is frequently a matter of discussion in controversies relating to the taking of property, and it is generally held that whatever physical interference

annuls this right takes 'property.'" (Page 189—Emphasis ours.)

"The right or element of user necessarily includes the right and power of excluding others from using the subject of property." (Page 189.)

"Thus, the term 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. As applied to lands the term comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract—those which are executory as well as those which are executed. It includes intangibles, as well as tangibles, even, in the former instance, those which are insusceptible of voluntary transfer by the owner." (Pages 191-192).

"Real property, under the earlier common law and now, except as modified or superseded by statute, consists of such things as are permanent, fixed, and immovable, as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, or cannot be moved from the place in which they subsist." (Page 195.)

"The word 'land', both in England and here, is a word of art. It is nomen generalissimum and includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings, fixtures, and fences. While it generally refers to something corporeal, it may include a franchise connected with land." (Page 196—Emphasis ours.)

"For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically." (Page 197).

"Coke says that 'tenementum, tenement, is a large word, to pass not only lands and other inheritances which are holden, but also offices, rents, commons, prof-

its a prendre out of lands, and the like, wherein a man hath any frank-tenement, and whereof he is *seised ut de libero tenemento.*' The word 'tenement' is of greater extent than the word 'land', and in its most extensive signification comprehends everything which may be holden, provided it be of a permanent nature; it includes not only corporeal hereditaments which are or may be held, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to or exercisable within the same, though they lie not in tenure." (Page 198.)

"'Hereditaments' is the largest and most comprehensive word of the phrase 'land, tenements, and hereditaments,' and is almost as comprehensive as 'property', for it comprehends anything capable of being inherited, be it corporeal, incorporeal, real, personal or mixed. Hereditaments may be either corporeal, such as lands, or incorporeal, such as a franchise, or the right of a riparian landowner to the use of riparian waters, or a profit a prendre." (Page 199.)

"One of the essential incidents of property is the right to acquire it by any lawful and legitimate means. As appears elsewhere, this essential right of property is preserved and guaranteed by the constitutional provisions, equally with the right to possess, enjoy and dispose of property." (Page 211.)

"As appears elsewhere, the right of property is a fundamental, natural, inherent and inalienable right, which is preserved and protected by the constitutional guaranties, and includes among its essential incidents the right to acquire and hold property." (Page 213.)

"The meaning of the term 'owner' is varied and depends in a great measure on the manner of its use. In common speech it is most often used to designate the person in whom the legal or equitable title rests, as distinguished from a mere occupant or tenant. When used alone it imports an absolute owner or one who has complete dominion of the property owned, as the owner in fee of real property." (Page 214.)

"Ownership of property implies the right of possession and control thereof and includes the right to protect and defend such possession against the intrusion or trespass of others." (Page 217—Emphasis ours.)

"As one of its incidents, the ownership of property carries with it, at law and in equity, the right to its products or increase, and the owner, in parting with the use of the land, may make such reservation of the products thereof as he chooses." (Page 217.)

"One of the principal elements of property is the right of alienation or disposition. This includes the right to alienate or dispose of it in any lawful manner which the owner deems fit, as well as the right to make any disposition of the subject of the property which does not interfere with the existing rights of others, the limitations on such power being those only which are prescribed by law. Every interest in land is the subject of sale and transfer." (Page 229—Emphasis ours.)

Could any Justice of this Court readily subscribe to any doctrine or rule of law which announced:

"Your property is your own except that you have no right of exclusion from its use by others for their gain or advantage, if you aren't physically using it and the use of it by such others won't physically injure it."

And yet that is what each concurring Justice in this case has really tentatively announced.

The necessary effect of this Court's holding is that the fee owners of land (which they own to the center of the earth) have nothing to grant or sell in the way of an underground easement for passage or storage of deleterious substances unless the disposal requires the right of ingress and egress upon, over and through the surface of the land. The necessary effect, therefore, is to hold that if I granted, for a consideration, and by formal instrument, such an easement, same would have conveyed nothing of value. I would then have sold an imaginary right. There would be no con-

sideration for the money paid and it could be recovered by the payer as for "money had and received." Literally, I would have sold the "Brooklyn bridge." Surely this Court could not continue to adhere to a decision so destructive of property rights, ancient in their character and extent.

It is conceded in the opinion that any interference with the right of plaintiffs to use their property constitutes an actionable tort. What is use? Am I using my property when I am merely holding it for sale? Plaintiffs here had something to sell. What? The right to use the underground strata for salt water disposal. That was interfered with and destroyed when defendants took that use forceably.

My property is taken from me when its use is taken from me. Its use is taken from me when I am forbidden to protect it against another's unpermitted use.

If I own property, that ownership is not worth much if I can't reserve absolutely the right to sell its use desired by another and to forbid such use by him unless he will buy the right to use it.

In *Bruch* v. *Carter*, 32 N. J. L. (3 Vroom) 554, at page 561, the Court defines property to be:

> " 'The unrestricted and exclusive right to a thing; the right to dispose of a substance of a thing in every legal way; to use and exclude every one else from interfering with it.' " (Emphasis ours.)

In *People ex. rel. Kuhn* v. *Common Council* (Mich.), 38 N. W. 470, at page 471, the Court said:

> "• • • We agree with the learned counsel for the relator that property does not consist merely of the title and possession. It includes the right to make any legal use of it, and the right to pledge or mortgage it, or to sell and transfer it."

And in the case of *In re Forsstrom*, 44 Ariz. 472, 38 Pac. (2d) 878, 880, the Court held as follows:

> "Rights pertaining to ownership of realty are 'property' as much as right to use land to which rights

> appertain, and, when person is deprived of any such rights, he is to that extent deprived of his property, although title and possession of land remain undisturbed."

In its opinion the Court recognizes that a "detriment to and reduction of the usable value of their property" would give plaintiffs a right of action.

Could it possibly be said with common sense that the "usable value" of property is not reduced when its *sale value* is destroyed? And its sale value is certainly destroyed when one who needs its use does not have to buy it but can simply take it.

The exclusive right to sell the use of property is a necessary and inherent, as well as an inseparable, element of that property. See the Supreme Court decisions hereinafter cited under Point Three.

Point Three

Property of plaintiffs is taken without due process of law

We have shown immediately above that property of plaintiffs has been taken. We now show that it was taken without *due process* in violation of the Fourteenth Amendment to the Federal Constitution. In this connection please see our original Answer Brief, pages 81 to 83, inclusive:

What is due process?

A careful reading of the controlling authorities will disclose that "due process" is hard to define with exactitude. See 12 American Jurisprudence, pp. 258 to 277.

But generally it can be safely said that arbitrary, capricious and oppressive laws, whether made legislatively or otherwise, fall before its prohibitions and inhibitions. Such is also true of laws fair on their face but arbitrarily and oppressively administered. Any machinery by which property is taken without compensation falls into the condemned category. See 12 American Jurisprudence, p. 271, and the many cases cited in footnote 20. The text referred to reads:

> "The principle of due process of law had its origin in England as a protection to individuals from arbi-

trary action on the part of the Crown. It has been said that in this country the requirement is intended to have a similar effect against legislative power—that is, to secure the citizens against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. It is a limitation upon arbitrary power and a guaranty against arbitrary legislation. The primary purpose of the guaranty is the security of the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Substantially the same idea is embraced in the statement that the great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizens."

See also:

West v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716;
New State Ice Company v. *Liebmann*, 285 U. S. 272, 76 L. Ed. 747;
City of Washington v. *Roberage*, 278 U. S. 116, 73 L. Ed. 210.

Neither the State nor Nation may require the use of privately owned property without just compensation.

West v. *Chesapeake & Potomac Tel. Co.*, 295 U. S. 662, 79 L. Ed 1640;
Delaware L. & W. R. Co. v. *Town of Morristown*, 276 U. S. 182, 72 L. Ed. 523.

Any condemnation by or under eminent domain principles is a denial of due process unless compensation is provided for and assured, and neither physical invasion nor physical injury to the property affected is necessary to require the payment of such compensation. See 18 Amer. Jur., p. 754, where it is said:

"One in charge of a public use, even though authorized by the state, may not take the property of an indi-

vidual for any purpose whatsoever, however beneficial it may be to the public, without compensation. Such purported authority is void and can afford no protection to anyone. The constitutional limitation against taking or damaging property for public use without compensation binds the legislature; it is a limitation upon legislative power, and it is clear that the legislature cannot authorize another to do an act in excess of legislative power."

See also:

Hot Springs R. Co. v. *Williamson,* 136 U. S. 121, 34 L. Ed. 355;
Dohany v. *Rogers,* 281 U. S. 362, 74 L. Ed. 904;
Southern Kansas R. Co. v. *Oklahoma City,* 12 Okla. 82, 69 Pac. 1050;
Stedman v. *State Highway Commission,* 174 Okla. 308, 50 Pac. (2d) 657;
C. R. I. & P. R. Co. v. *Prigmore,* 180 Okla. 124, 68 Pac. (2d) 90.

The Supreme Court of Kansas has dealt with and decided, on broad grounds the very questions presented under this and the succeeding Point. That Court said in substance that property is property—that there are no ifs and ands about it—and that to take that property by unauthorized, discriminatory but judicially approved condemnation would be unconstitutional as well as unthinkable in moral principle.

In the case of *Strain* v. *Cities Service Gas Co.,* 148 Kan. 393, 83 Pac. (2d) 124, the Supreme Court of Kansas used the following language:

"It is the settled law that private property is not to be taken for private use. In *Bangor & Piscataquis R. R. Co.* v. *McComb,* 60 Me. 290, 295, this fundamental concept was thus expressed:

" 'This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which

secures to every individual the right to acquire, possess, and defend property. *As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, on obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate. The constitution protects him and his possession, when held on, even to the extent of churlish obstinacy.'*

"See *Irrigation Co.* v. *Klien,* 63 Kan. 484, 488, 65 P. 684; *Shawnee County Com'rs.* v. *Beckwith,* 10 Kan. 603." (Emphasis ours).

That case which is fully discussed and presented in our Reply Brief at pages 7-13 thereof appears to us to require modification by this Court of the statement in its opinion that:

"• • • research has failed to disclose any case decided by any court of last resort determinative of this question."

We think that the decision in the Strain case fits this case "like a glove" and we urge a careful study of it now by this court.

And it is no less a taking without due process (where no compensation is paid or provided for) simply because the one engaging in the taking (by continuous and repeated trespass or unauthorized user) is one having by law the power and right of eminent domain (as even in the case of the ultimate sovereign).

This is clearly the effect of *Portsmouth Harbour Company* v. *United States,* 260 U. S. 327, 67 L. Ed. 287, in which case, Mr. Justice Holmes spoke for the Supreme Court. The Court there held that the firing of gun shot through the air over land was a "taking" of the land which required the government to pay for it as by way of condemnation (a power the government has). The Court there said:

"If the United States, with the admitted intent to fire across the claimants' land at will, should fire a

> single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient member and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose."

And, as pointed out in the Portsmouth case, the very establishment by defendants of the vast and expensive gathering system, and the costly, powerful injection station, pumps and machinery, furnish most potent evidence of the intent of defendants to continue. This the jury passed upon and its finding should be final.

It has been always and consistently held by the Supreme Court of the United States that any form of legal compulsion for the dedication or use of private property for public use without adequate and fair compensation is a denial of due process. A typical example is forbidden confiscation arising out of state (or federal) rate orders (statutes) establishing inadequate rates for public utilties.

See:

Oklahoma Natural Gas Company v. *Russell,* 261 U. S. 290, 67 L. Ed. 659;
Prendergast v. *New York Telephone Company,* 262 U. S. 43, 67 L. Ed. 853;
Smith v. *Illinois Bell Telephone Company,* 270 U. S. 587, 70 L. Ed. 747;
Banton v. *Belt Line Railway Corporation,* 268 U. S. 413, 69 L. Ed. 1020;
Board of P. U. C. v. *New York Telephone Company,* 271 U. S. 23, 70 L. Ed. 808.

The analogy between a situation where property of a private individual is taken for public use and one where the use of such property (as distinguished from the property

itself) is taken has been made clear by the Supreme Court. There is no difference between the taking of the use of property for the benefit of the public and taking that property.

The following pertinent language is used by the Supreme Court in *West* v. *C. & P. Telephone Company,* 295 U. S. 662, 79 L. Ed. 1640:

> "Where the property itself is taken by the exercise of the power of eminent domain, just compensation is its value *at the time of the taking,* so, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon *that value.*" (Emphasis ours).

A reading of this Court's opinion, in light of these pronouncements, making current application of the specified tests, should convince at once that due process of law has been denied to plaintiffs, by the statutes (Orders) of Oklahome, which are construed and applied by this Court in its opinion to authorize the said "taking" without compensation or redress of any kind.

Point Four

Plaintiffs are denied equal protection of the laws.

The inevitable result of the Court's decision is to do two things:

> (1) To create a favored class exempt from the requirement of the Law of Eminent Domain that fair and just compensation be paid for property taken for public use;
>
> (2) To create a class against which a discriminatory expropriation is in order and invited in favor of a specially favored class described in (1) immediately above.

This surely denies equal protection of the laws to those in class (2) above. And it is wholly without rhyme or reason in law, equity or logic. Even the Sovereigns (Fed-

eral, State, County and municipality) are not so favored and all citizens are protected against their "takings" for public use. All public utilities (which serve the public with essential services rather than serving strictly their own ends) are required to pay for what they take to use in that public service.

We think it unfortunate that the Chief Executive of the State should have been influenced by those of his own industry (the oil) to throw the great weight of the State of Oklahoma into the balance to swing that balance towards special interests under the guise of benefiting the State. Such was unjust, unfair and not in the public interest as will be ultimately recognized at the bar of public opinion, because the rights were secured to a favored industry *without cost to that industry and without compensation* to the class discriminated against.

It is a denial of equal protection of the laws when a state favors one group at the expense of another without reasonable basis and under similar circumstances. All citizens and groups of citizens must be accorded equal rights, privileges and immunities under similar circumstances. This the Fourteenth (XIV) Amendment to the United States Constitution requires. And always heretofore this Court has required the uniform application of the legislative pronouncements. See that portion of our original Answer Brief dealing with the laws of Eminent Domain at pages 42 to 44, inclusive.

It was obviously upon the theory of the public need (as represented by the oil industry's need) for cheap means of disposal of salt water for the economic benefit of Oklahoma (as the Governor argued through the Attorney General, noted and recited in the Court's opinion) that the Court decided that the taking and use of plaintiff's property was lawful and not to be paid for.

But the Supreme Court of Kansas said in the *Strain* case:

> "In *Shawnee County Com'rs.* v. *Beckwith,* 10 Kan. 603, it was said:
>
> " '*No man can be divested of his land, or of any part thereof or interest therein, through the exercise*

of the power of eminent domain, or of any other power, except under the provisions of express and positive constitutional or statutory law; and he cannot be divested through the exercise of such power of any more or greater interest in his land than the constitution or statutes expressly provide for.' Syl. 1." (Emphasis ours.)

And further, Mr. Justice Wedell in his specially concurring opinion in the *Strain* case said:

> " • • • *We will do well to leave legislation to the law-making bodies where, under our present system at least, it still belongs. And this is especially true with respect to disturbing the rights of citizens with a strong hand and under the guise of the drastic remedy of eminent domain.*" (Emphasis ours)

And as shown elsewhere herein, in no event could there be constitutional legislation of this type without a concomitant provision for compensation.

In 12 Amer. Jur., page 128, appears this language:

> "Specific protection from unequal operation of the laws entitling a person to like privileges and burdens accorded to other persons in like circumstances is essentially and peculiarly an American concept."

And further, it is said at page 131:

> "One of the principles on which this government was founded is that of equality of right, and this principle is emphasized in the equal protection clause of the Fourteenth Amendment. The Constitution of the United States is no respecter of persons, and rich and poor are to be accorded equal rights under it."

And also at page 140:

> "Class legislation discriminating against some and favoring others is what is prohibited by the equal pro-

tection clause of the Fourteenth Amendment to the Constitution."

In this regard please see:

Traux v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254;
Skinner v. *State of Oklahoma,* 316 U. S. 535, 86 L. Ed. 1165;
Sipuel v. *State of Oklahoma,* 332 U. S. 631, 92 L. Ed. 247.

Any attempted differentiation by "classification for purposes of legislation must be reasonable and based upon fact". See the cases last above cited.

Certainly it could not be here said that there is any "reasonable reason for any difference 'based upon fact'" between the need for the use by the oil companies for underground storage of salt water and the need of railroads, pipe lines, telephone companies and others for rights of way, etc. There could not be any semblance of reason for a "classification" which required the latter group to pay compensation for the property taken for public use while wholly exempting the former group from it.

That is what the Oklahoma Statutes (orders) of Oklahome attempt to do, interpreted and applied as they are by this Court in this cause.

Point Five

No "migrating" or "percolating" or "seeping" waters are here involved, and defendants were guilty of trespass.

As pointed out above, the whole basis for this Court's decision is the erroneous assumption (as evidenced by many statements to this effect) that the salt waters which were gathered and forced into and across and stored in plaintiffs' land were "migrating" or "percolating" or "seeping" waters. Under this record and as evidenced by other statements in the opinion of this Court, these could not possibly have been "migrating" or "percolating" or "seeping" waters.

In the opinion the Court says:

> "The salt water was injected into the abandoned well with considerable force."

And:

> "Plaintiffs did not give the defendants permission to so push or force their salt water into the formation under plaintiffs' land, but before the Corporation Commission and at all times objected to the injection of salt water into said formation by defendants."

But then, some fourteen to eighteen times thereafter the Court ignores this fact (of extensive gathering and forceable casting of the waters into plaintiffs' land) and refers to the salt water as "migrating" or "percolating" or "seeping". Nothing could be farther from the truth.

The record shows:

(1) That some 4,000,000 barrels of salt water were collected by defendants from some 200 wells widely scattered, and by means of a vast gathering and pumping system (built for the express purpose) were injected under constant and continuous pressure of 25,000 pounds into the disposal well;

(2) That it was an established and well-known fact in the oil industry that under such circumstances, the water would inevitably travel "up dip";

(3) That plaintiffs' land lay just a few feet immediately East of the disposal well;

(4) That the sub-strata was geologically such that the salt water would occupy and travel in a defined stream or course across the area of plaintiffs' 160 acres, in a triangular form with the apex of the triangle at the disposal well;

(5) That all these facts were known in advance of the first injection and continuously thereafter;

(6) That defendants deliberately did these acts intending to accomplish the results above indicated;

(7) That defendants profited to the extent of not less than ten cents per barrel by using this means of disposal;

(8) That (uncontradicted) at least fifty per cent of the salt water injected into the disposal well was forced in this manner into plaintiffs' land; and

(9) That plaintiffs had always objected and had never granted any right to defendants and had never been paid a "sou" for this use of their land.

The Court's opinion leaves the impression (and in truth is bottomed upon the finding) that these salt waters were placed in defendants' substrata and *thereafter found their way* by virtue of forces of nature into plaintiffs' land. This is the only hypothesis which will square with the use of the terms "migrating", "percolating" and "seeping".

An examination by this Court of the authorities will at once convince that those terms connote movement by voluntary action or according to the free laws of nature, such as gravity. No one of them can be made to fit this situation. In truth, the term "migrate" will be found not usually to apply to movement of inanimate things but only to men, animals, birds, etc. But even when applied in a limited scope to oil and gas, the term excludes movement caused by artificial means. For instance, Webster's Unabridged Dictionary says:

> "migration (as to petroleum)—any underground movement of oil or gas not occasioned by artificial means."

Likewise, "percolating" waters are not those which are forced in a steady or constant, definable course.

In the case of *Di Guilio* v. *Rice et al.* (Calif.), 70 Pac. (2d) 717, the Court uses this language:

> "'Migratory' is similarly defined to mean: '1. Making a migration or migrations; moving habitually or occasionally from one region or climate to another; disposed to migration. 2. Roving; wandering; nomad;

as, migratory habits. 3. Of or pertaining to migration.'

We have of late heard a good deal about 'migratory agricultural workers'; and in defining 'migration' the same authority speaks of the migration of individuals, birds, mammals, bats, fish, and insects.

"From these definitions it will be noted that they all speak of animate bodies of one character or another, which move through habit or disposition."

In the case of *Bower et al.* v. *Moorman et al.*, 147 Pac. 496, the Supreme Court of Idaho announced that:

"Percolating waters have been defined by the Supreme Court of California, in the case of *Los Angeles* v. *Hunter*, 156 Cal. 603, 105 Pac. 755, as 'vagrant, wandering drops, moving by gravity in any and every direction along the line of least resistance.' "

In the case of *Canada et al.* v. *City of Shawnee*, 179 Okla. 53, 64 Pac. (2d) 694, Syllabus 1 by the Court reads:

"In legal consideration subterranean waters are divided into two classes: (1) Percolating waters, and (2) underground streams. Percolating waters are those which seep, ooze, filter, and otherwise circulate through the subsurface strata without definite channels. Underground streams are waters passing through the ground beneath the surface in definite channels."

In the case of *City of Los Angeles* v. *Hunter et al., Same* v. *Buffington et al.* (Calif.), 105 Pac. 755, paragraph 1 of the syllabus reads:

" 'Percolating waters', in the common-law sense of the term, are those that are vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. The term does not include waters percolating only in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet in

conformity with the physical law to attain a uniform level."

In the body of the opinion, it is stated:

> "The waters of the San Fernando Valley therefore are not 'percolating waters' in the common-law sense of the term—vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. These waters percolate, it is true, but only in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet, in the effort, in conformity with physical law, to attain a uniform level."

In the case of *Righter* v. *Jersey City Water Supply Co.*, 63 Atl. 6, the Supreme Court of New Jersey announced that:

> "The plaintiff's proof was that it was caused by seepage; that is, the water which finds its way through the bank. It may come through the bank, as it would if the core were not impervious to water, or it may escape over or under the core, because of its not being sufficiently high or deep."

So, in basing its decision on the assumption that "title" to these salt waters passed to plaintiffs on the theory that they were "migrating, percolating, or seeping" waters, the Court wholly misconceived the nature of such waters. And under these circumstances, where the pressure caused movement in a mass from west to east in definable or ascertainable channels, no "title" to the salt water passed to plaintiff (even if they had wanted it).

See:

City of Edmond v. *Billing*, 170 Okla. 34, 38 Pac. (2d) 564;
Clinchfield Coal Corp v. *Compton* (Va.), 139 S. E. 308;
Evans v. *Seattle* (Wash.), 47 Pac. (2d) 984;
Canada v. *Shawnee* (Okla.), *supra*.

But, we reiterate that this really makes no difference since defendants committed a continuous, repeated and deliberate trespass in connection with which they deprived plaintiffs of their property as above shown. Please reconsider pages 21 to 33, inclusive, and 73 to 76, inclusive, of our Original Answer Brief. The authorities to follow fully support our position here. None of them makes any distinction based on "title" to the instrumentality accomplishing the trespass.

Our Supreme Court in the case of *City of Muskogee* v. *Hancock*, 58 Okla. 1, 158 Pac. 622, announced that:

> "The thrown missile is but an instrument of the lawless force which itself is the invader. *By whatever means it intrudes, it is none the less a trespasser, and the person who calls it into being cannot be heard to excuse himself on the plea that he needed its services in his own affairs, which could not properly be served otherwise*" (Emphasis ours).

In *Western Union Telegraph Company* v. *Bush*, 89 S. W. (2d) 723, the Court used this language:

> "* * * *It is sufficient if the wrongdoer actually set in motion some dangerous agency which, in itself, though far distant from the wrongdoer, inflicts a wrong; such is a 'breaking of the close,' and for that trespass relief is granted*" (Emphasis ours).

In 52 Am. Jur. 846, it is said:

> "Physical invasion of the property of another does not necessarily imply an actual breaking or entering of the close by the wrongdoer in person, but may be accomplished by the casting of substances or objects upon the plaintiff's property from without its boundaries. * * * *An entry may also be accomplished by setting in motion an agency which, when put in operation extends its energy to the plaintiff's premises to their material injury*" (Emphasis ours).

In 63 C.J. 897, it is said:

> "The entry need not be in person *but may be by the projections of force beyond the boundary of the land where the projecting instrument is employed.* Thus, the trespass may be committed by *casting earth, or other substances, upon another's land, by projecting anything into,* over, or upon the land;" (Emphasis ours).

In 1 Am. Jur. 504, it is said:

> "An ordinarily lawful use of property becomes unreasonable, and therefore unlawful, where the necessary effect is physically to invade the property of another owner."

Conclusion

We conclude that the above and foregoing discussion and cited authorities require that the rehearing sought by defendants in error be granted and that a new and correct opinion be written by this Court announcing a new and correct decision fully in accord with the views of the defendants in error herein expressed. Of course, the rehearing to be granted should include a rehearing and adequate action upon the cross-appeal of these defendants in error so as to result in the affirmance of the judgment of the court below in favor of these defendants in error and a reversal of the judgment of the court below insofar as said judgment set aside the jury verdict in favor of these defendants in error for punitive damages with directions to the court below to reinstate the jury's award for said punitive damages.

Respectfully submitted,

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Oklahoma City, Oklahoma,
Attorneys for Defendants in Error.

September, 1950.

APPENDIX "C"

IN THE

SUPREME COURT OF THE STATE OF OKLAHOMA

No. 33,712

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, a Joint Association, et al., *Plaintiffs in Error,*

vs.

L. T. ROSECRANS, et al., *Defendants in Error.*

Journal Entry

Now on this 3rd day of October, 1950, the Court having considered defendants' in error petition for rehearing, doth overrule and deny same, to which the defendants in error are allowed an exception.

/s/ DENVER N. DAVISON,
Chief Justice.

APPENDIX "D"

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Cause CD No. 968 Order No. 17881

In the Matter of the Application of PEPPERS REFINING COMPANY, et al., for authority to Prosecute Water Flood in Canadian County, Oklahoma, in the West Edmond Pool.

Report of the Commission

This cause came on for hearing before the Corporation Commission of the State of Oklahoma in its court room in the Capitol Office Building, Oklahoma City, Oklahoma, on the 31st day of May, 1945, at 10 o'clock, A. M., upon the application filed by West Edmond Salt Water Disposal Association, composed of Sohio Petroleum Company, Anderson-Prichard Oil Corporation, Peppers Refining Com-

pany, Amerada Petroleum Corporation, Magnolia Petroleum Company, L. A. Chudacoff, Mid-Continent Petroleum Corporation, Skelly Oil Company, Stanolind Oil and Gas Company, Fox and Fox, and Sinclair Prairie Oil Company, for an order authorizing applicant to dispose of salt water in a well located in the Northeast Quarter of the Northeast QUARTER of Section 12, Township 13 North Range 5 West, Canadian County, Oklahoma. With Chairman Reford Bond and Commissioners Ray O. Weems and Wm. J. Armstrong sitting, the following appearances were made: Applicant by T. Murray Robinson and W. H. Brown; Stanolind Oil and Gas Company by Roy H. Smith; Sinclair Prairie Oil Company by Robert H. Imler; Magnolia Petroleum Company by W. R. Wallace; Continental Oil Company by R. Van A. Mills and C. C. Frye; and protestants L. T. Rosecrans, et al., by John Cantrell; whereupon testimony was introduced and arguments by counsel heard, and the Commission took the matter under advisement.

Now, on this 4th day of June, 1945, the matter came on for discussion before the Commission in conference, and the Commission, being fully advised in the matter, is of the opinion that the application should be granted, and finds as follows:

Findings

1. That notice by publication of the filing of the application herein, the time and place of the hearing thereon, and the purpose of such hearing, has been regularly given in all respects as required by law, and the Commission has jurisdiction of the subject matter embraced in said application and of the parties interested therein and jurisdiction to issue and promulgate the hereinafter prescribed order.

2. That the members of the West Edmond Salt Water Disposal Association are the operators of oil and gas mining leases in the West Edmond Hunton Pool, located in Canadian, Oklahoma, Logan, and Kingfisher Counties, State of Oklahoma; that approximately 500 wells have been drilled in said pool to the Bois d'Arc Section of the Hunton Lime Formation, which is a common source of supply of

oil; that large quantities of oil, gas, and water have been removed from said Bois d'Arc section, thereby causing a large and rapid decline of bottom hole pressures in said wells; that applicants own a permit from the land owners of the Northeast Quarter of the Northeast Quarter of Section 12, Township 13 North, Range 5 West, Canadian County, to inject water in the Robson No. 1 well, which was completed as a dry hole in the center of said forty acres, with salt water found in the Bois d'Arc Section of the Hunton Lime Formation at an approximate depth of 7070 feet, and the Hoover and Tonkawa Sand Series, found at an approximate depth of 4500 to 5000 feet.

3. That this Commission heretofore under its Order No. 17753 issued on the 18th day of April, 1945, authorized disposal of salt water in the Bois d'Arc section of the Hunton Lime Formation in said well, and these applicants now propose to dispose of salt water in the Hoover and Tonkawa Sand Series if this application is granted.

4. That wells located along the west edge of the West Edmond Hunton Pool have commenced to make water, and that there is no adequate method of disposing of same; that said salt water is being stored in earthen tanks and being hauled away in trucks, all of which is hazardous in that excessive rainfall might pollute the surface streams and underground fresh water strata; that in the interest of protecting the surface owners, the salt water should be reintroduced into the formation from which it was produced.

5. That this Commission has jurisdiction to protect fresh water and oil and gas bearing strata, and the injection of salt water into the Hoover and Tonkawa Sands Series by gravity or injection under pressure will not cause damage to any oil or gas bearing strata since they are nonproductive of oil and gas in this well and in other wells in the pool; that under the evidence casing in said well has been cemented in such manner as to protect all fresh water strata from salt water injected in said well.

6. That an efficient method of salt water disposal from said pool would tend to eliminate pollution of the surface and the streams in the area, and will aid in the recovery of oil from said pool.

7. That this Commission should retain jurisdiction of this matter for the purpose of issuing any order it may deem necessary in the premises if in the future it appears that damage is being caused to any fresh water strata or oil or gas production formations by salt water injection.

Order

It is therefore ordered by the Corporation Commission of the State of Oklahoma as follows:

1. That applicant, West Edmond Salt Water Disposal Association, be, and it is hereby, granted the right and authority to dispose of salt water by gravity or injection under pressure into the Hoover and Tonkawa Sand Series found between the depths of 4500 and 5000 feet in the Robson No. 1 well located in the Northeast Quarter of the Northeast Quarter (NE¼ NE¼) of Section Twelve (12), Township Thirteen (13) North Range Rive (5) West, Canadian County, Oklahoma, in the West Edmond Hunton Pool.

2. That applicant shall inject such salt water in such manner as not to pollute or damage the fresh water strata or any oil or gas bearing strata in said pool.

3. That this Commission will retain jurisdiction of this matter for the purpose of issuing any further orders necessary in order to protect the fresh water strata and oil and gas bearing sands in said West Edmond Hunton Pool.

DONE AND PERFORMED by the Corporation Commission at its offices in the Capitol Office Building, Oklahoma City, Oklahoma, this 4th day of June, 1945.

CORPORATION COMMISSION OF THE
STATE OF OKLAHOMA
REFORD BOND, Chairman
RAY O. WEEMS, Vice-Chairman
WM. J. ARMSTRONG, Commissioner

Attest:
TOM MCMURRAY, Secretary
(Seal)

APPENDIX "E"

BEFORE THE OKLAHOMA PLANNING AND RESOURCES BOARD

DIVISION OF WATER RESOURCES

No. 3-45

In the Matter of the Disposal of Oil Field Brine by West Edmond S.W.D.A., Oklahoma City, Oklahoma

Order

At a regular meeting of the above named Board, and acting upon the recommendation of the Director of the Division of Water Resources, this Board, insofar as it has power and authority under the laws of the State of Oklahoma and the Rule and Regulations of the Oklahoma Planning and Resources Board, approves the plan set forth in Application No. 3-45, filed the 12th day of May, 1945, by the West Edmond S.W.D.A. for disposal of oil Field Brine produced along with oil, gas and other petroleum products upon the following described property:

Twp. 15 N, Range 4 W, Oklahoma County
Twp. 14 N, Range 4 W, Oklahoma County
West Edmond Field

Subject to the further lawful control and supervision of the area as provided by law, and that same be without prejudice to rights of other citizens.

Dated this 14th day of June 1945.

OKLAHOMA PLANNING AND RESORCES BOARD
/s/ LON MCBRIDE, Chairman
/s/ CLARENCE BURCH, Director, Division of Water Resources.

Attest:
/s/ A. L. COOK, Secretary

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

Office-Supreme Court
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No. 504

L. T. ROSECRANS, MARY B. ROSECRANS, J. M. BAILEY, ADMINISTRATOR OF THE ESTATE OF MARY A. ROSECRANS, DECEASED, ET AL., *Appellants,*

vs.

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, A JOINT ASSOCIATION, PEPPERS REFINING COMPANY, SKELLY OIL COMPANY, ET AL., *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 33712

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, ET AL.,

Plaintiff-in-Error,

vs.

L. T. ROSECRANS, ET AL.,

Defendants-in-Error

STATEMENT OPPOSING JURISDICTION; MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

Statement Opposing Jurisdiction

I

The record does not show that any question involving the validity of a state statute under the Fourteenth Amendment of the Constitution of the United States was decided by the Supreme Court of Oklahoma.

II

The record shows that the decision of the Supreme Court of Oklahoma is based upon adequate local and non-Federal grounds.

III

The record shows that the decision of the Supreme Court of Oklahoma is based solely upon questions of fact presented in the trial below.

IV

The record does not present for decision any substantial Federal question.

Motion to Dismiss

Plaintiffs-in-error move to dismiss this appeal on the ground that no Federal question is involved.

No statute of the State, order of Oklahoma Planning and Resources Board or order of the Corporation Commission purported to authorize, or was construed by the Supreme Court of Oklahoma to authorize, the infliction of injury upon defendants-in-error or their land, or to exempt plaintiff-in-error from liability therefor.

The Supreme Court of Oklahoma, far from construing the statutes and orders as exonerating plaintiffs-in-error from liabilty for injury to the land of defendants-in-error held that plaintiffs-in-error would be liable for such injury, and it reversed the judgment of the trial court upon the sole ground that the evidence showed that defendants-in-error had suffered no injury.

BRIEF IN SUPPORT OF JURISDICTIONAL GROUNDS AND MOTION TO DISMISS APPEAL

Statement

In this brief the defendants-in-error will be referred to as appellants, and the plaintiffs-in-error as appellees.

Appellants own 160 acres of land near the West Edmond oil field in Oklahoma. Appellees produce oil in that field, and in doing so they also produce large quantities of salt water which must be disposed of. It is a violation of both the civil and criminal laws of the State to pollute the streams or poison the surface of land with it. In that situation appellees obtained permission of the owner of 40 acres of land, in the center of which a dry well had been drilled and abandoned, to pump the salt water into that well; and they applied to and obtained permission of the Oklahoma Planning and Resources Board and the Corporation Commission to do so.

While appellees were doing so, appellants, whose land adjoined the 40 acres, sued them in a state court upon five causes of action, alleging that the salt water put into the well percolated or was forced into the formation underlying their land. In the first cause of action they alleged that that constituted an eviction, and prayed judgment for the possession of the land and that appellees be ejected therefrom. In the second they prayed an injunction enjoining appellees from continuing their operation. In the third they prayed judgment for "mesne profits and benefits enjoyed and produced by the defendants" in the sum of $50,000. In the fourth they alleged that appellees' acts constituted "underground trespass upon and physical invasion of" their lands, to their damage in the sum of $25,000. In the fifth they alleged that appellees had acted

wantonly, arbitrarily and oppressively, and prayed punitive damages in the sum of $50,000.

The jury returned a verdict for appellants on the first, third and fifth causes of action, but the trial court set aside the verdict as to the fifth, which awarded punitive damages, and rendered judgment in favor of appellants in ejectment and for $12,500 damages upon the first and third causes of action, from which appellees appealed to the Supreme Court of Oklahoma.

That court reversed the judgment with directions to set aside the verdict and render judgment for appellees. This appeal is from the judgment of the Supreme Court.

The Legislation

We know of no statute purporting to confer upon either the Oklahoma Planning and Resources Board or the Corporation Commission power to authorize the injection of salt water into a well, or to exempt those doing so from liability for injury caused thereby.

Sec. 296, Tit. 52, O. S. 1941, is as follows:

> "No inflammable product from any oil or gas well shall be permitted to run into any tank, pool or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles at a safe distance from the tanks, wells or buildings, and be immediately burned or transported from the premises, and in no case shall it be permitted to flow over the land. *Salt water shall not be allowed to flow over the surface of the land.*"

The Oklahoma statutes prohibit the waste of oil and gas, and include in the definition of waste "underground waste, including water encroachment in the oil and/or gas bearing strata" (Sec. 85, Tit. 52, O. S. 1941). And Sec. 237 of the same title defines waste of gas as including the "intentional drowning with water of a gas stratum capable of

producing gas in commercial quantities." And those statutes confer upon the Corporation Commission power to prevent, but not to permit, such waste.

The Oklahoma Planning and Resources Board was created by Oklahoma Session Laws 1936-37, Chap. 23, p. 74, Sec. 3 of which provided:

> "All rights, powers, duties and limitations of the Conservation Commission, Oklahoma Forest Commission, and the Oklahoma State Planning Board be and the same are hereby conferred upon and transferred to the Oklahoma Planning and Resources Board."

Among the powers conferred are the following:

> "Said Board is hereby given the right and authority to regulate and control the pollution of all streams, creeks, lakes, rivers, water courses, and sub-surface water, in the state of Oklahoma and flowing through the state of Oklahoma. If any person, firm or corporation shall violate any law, rule or regulation, said violation thereof shall be deemed a misdemeanor and upon conviction punished accordingly. Nothing herein contained shall be construed as affecting or limiting the powers now given by statute to the Corporation Commission or the Proration Commission in the regulation and control of streams and water pollution." (Okla. Stat. 1941, Tit. 74, Sec. 351c).
>
> "(b) To control rivers, creeks, ponds and lakes, to prevent or aid in the prevention of damage to person or property from such harmful waters within the State of Oklahoma; the Conservation Commission is authorized to adopt and apply the necessary methods and means to purify and render sanitary all water impounded by or under its authority and also to prevent the contamination or pollution of any and all reservoirs, ponds, lakes, creeks, and rivers and to call upon the Attorney General to bring any suit or action by the Commission deemed necessary to effect this object." (Okla. Stat. 1941, Tit. 82, Sec. 486).

It is thus seen that the power of the Corporation Commission with respect to the injection of water into a well is restricted to preventing the drowning of oil and gas bearing strata, and that of the Planning and Resources Board is restricted to preventing pollution of streams, lakes and subsurface water, and preventing damage to persons or property thereby. Properly construed, those acts do not require permission of the Corporation Commission or the Planning and Resources Board for the injection of salt water into an abandoned well that will neither drown an oil and gas bearing stratum or pollute streams or water wells; and appellees applied for the orders only out of an abundance of caution. The orders did not purport to exempt appellees from liability for damage done to others, and neither tribunal had power to do so.

The Supreme Court's Opinion

In its opinion the State Supreme Court found as follows:

> "That immediately west of the property of plaintiffs, in the center of a 40-acre tract adjoining the land of plaintiffs, was located an abandoned oil well known as the Robson well, and that defendants purchased from the owners of that land the right or permission to inject into said dry and abandoned well, in a stratum or formation known as the Hoover-Tonkawa formation, salt water piped to said dry and abandoned well from other wells operated by defendants in the West Edmond field, which were producing salt water in considerable quantities along with oil and gas. From the evidence it further appears that this Hoover-Tonkawa formation was a porous sand formation or series some 500 feet thick underlying the 40-acre tract upon which the abandoned well was located, and underlying also the land of plaintiffs and the entire West Edmond oil field, said formation being 4,500 feet below the sur-

face of the land; that said formation was completely saturated with salt water, and that no oil or gas was being or could be produced therefrom.

"It also appears that the abandoned well had been so plugged and cemented that all oil sands below and above the Hoover-Tonkawa formation were protected from the salt water injected into said well, so that there was no possibility that the injection of salt water into it would in any way injure any other formation or strata in said field from which oil or gas or fresh water was being or could be produced."

Further on the Court said:

"According to one witness almost half of the salt water so injected would migrate or percolate into the formation under the land of plaintiffs, displacing a similar amount of salt water which would be pushed further east. Plaintiffs did not give the defendants permission to so push or force their salt water into the formation under plaintiffs' land, but before the Corporation Commission and at all other times objected to the injection of salt water into said formation by defendants.

"The evidence shows that the salt water in the Hoover-Tonkawa formation was confined to that formation by impervious shale or clay formations immediately above and below it, so that salt water contained in said formation could not seep or percolate into the strata above or below the said formation, and that the said formation was saturated with salt water and was of great extent, the actual boundaries thereof not being capable of accurate ascertainment. At the time of trial, June 9, 1947, the witnesses testified that the total volume of salt water injected into the well was some 4,156,370 barrels. One of the witnesses for plaintiff testified that this amount was trifling when compared to the vast amount of salt water contained in the Hoover-Tonkawa formation, testifying that it was comparable to dropping an eyedropper full of water into the ocean.

> "The plaintiffs produced no evidence tending to prove actual damages to their land or interference of any kind with the full use and enjoyment of the land by them. By one witness they offered to prove that the forcing of salt water into the said formation might eventually produce erosion and result in the cutting of channels or canals in the formation so that there would be a leakage of salt water from this formation to the sands below them. This offer was denied by the trial court. It is conceded that the defendants had not invaded, trespassed upon, or taken possession of the land of plaintiffs, or any portion thereof, save and except by the injection of salt water into the said formation and its migration or percolation into that portion of the formation which underlies the land of plaintiffs."

And the Court stated the question involved as follows:

> "The decisive question presented for determination is whether the owner of land, who injects, through a well upon his premises, salt water into an underground stratum which contains nothing but salt water, which salt water so injected, commingling with the salt water in said stratum, migrates or percolates into the portion of said stratum underlying the land of his neighbor, thereby trespasses upon the lands of his neighbor, or takes wrongful possession of the portion of such stratum underlying the land of his neighbor, so as to become liable to his neighbor therefor, although no actual damage is inflicted upon or suffered by his neighbor, nor is he deprived of any right pertaining to, or consistent with, the full and complete use, occupation, or enjoyment of his land."

The Supreme Court, far from understanding that appellees contended that the statutes and orders involved exempted them from liability for injury done by them, said:

> "The defendants and the Attorney General unhesitatingly admit and affirm the liability of the defendants

or other oil producers disposing of salt water by injection into underground formations for any actual damage or injury resulting therefrom to adjoining property owners. But they assert that the mere injection of salt water in the Robson well, and its migration into the salt water bearing formation underlying the land of plaintiffs, does not in itself, absent any injury or damage to the land of plaintiffs, or any deprivation of their right to use, occupy, and enjoy their lands, constitute an unlawful or wrongful trespass upon or taking possession of the land of plaintiffs or any portion thereof in such fashion that plaintiffs could maintain ejectment against them, or could maintain an action for mesne profits, or could enjoin them on the theory of a continuing trespass. They assert that the only liability of the defendants is a liability for actual damage or injury to the land of plaintiffs, or the deprivation of some right previously vested in plaintiffs to use, occupy, and enjoy their property fully and completely."

And as to that contention it said:

"Careful consideration of the authorities cited in the briefs of the respective parties, and other authorities examined by us, convinces us that the contention of the plaintiffs is untenable; that the defendants have not trespassed upon the land of plaintiffs, nor taken possession of any part thereof; nor deprived the plaintiffs of any right in the full and complete possession and use of their property, and that the contention of defendants that they are liable only for actual damage suffered by plaintiffs resulting from the injection of salt water into said well must be sustained."

Further on it said:

"In the instant case, conceding that the salt water injected into the Robson well would migrate into the Hoover-Tonkawa formation under the land of plaintiffs, the only effect of such migration, according to

the testimony of plaintiffs' own witnesses, was to displace a similar amount of salt water in said formation and cause it to migrate further east. Under this testimony, the formation being already saturated with salt water, the acts of defendants did not increase the amount of salt water under plaintiffs' land or render it any more deleterious or detrimental to plaintiffs' land than it had been before.

* * * * * * *

"The applicable and governing principle in this case is the rule of reasonable use, that is, that a person may use his property in any lawful manner, except that he must not use it so as to injure or damage his neighbor. * * *"

"Measured by this rule, we find that the act of the defendants in injecting salt water into said well was lawful, and that in the exercise of such right defendants did not take the property of plaintiffs or any part thereof, or injure or damage same, or deprive the plaintiffs of any rights in connection therewith. This being the case, there was no basis or foundation upon which plaintiffs could maintain any of the causes of action asserted in their petition, and the motion for directed verdict made by the defendants at the close of all the evidence should have been sustained."

It is thus seen that this is not a case "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity." The substance of the decision was that the statutes and orders did not exempt appellees from liability for injury caused, but that no injury was in fact caused. The situation would be different if appellants had been injured, and the Supreme Court had held that the statutes and orders exempted them from liability, and were nevertheless valid. But that was not its holding.

Even if appellees' acts were wrongful, the question would be whether a state law that denies recovery on account of them where no injury has been suffered is violative of the 14th Amendment;—whether under that amendment damages must be awarded for wrongful acts though no injury has resulted. To state the question is to answer it. This cause was decided solely upon a question of fact and not upon the determination of the constitutionality of any statute or order.

It is submitted that the statement opposing jurisdiction is well taken; that this cause involves no Federal question, and that the appeal should be dismissed.

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No. 504. ROSECRANS ET AL. *v.* WEST EDMOND SALT WATER DISPOSAL ASSOCIATION ET AL. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted. *John H. Cantrell*

DARK PAGE BLEED

and *B. H. Carey* for appellants. *David A. Richardson, T. Murray Robinson, Walace Hawkins, Robert W. Richards, Russell G. Lowe, Ralph W. Garrett, Don Emery, Rayburn L. Foster, R. M. Williams, Harry D. Turner* and *W. H. Brown* for appellees. Reported below: 204 Okla. 9, 226 P. 2d 965.